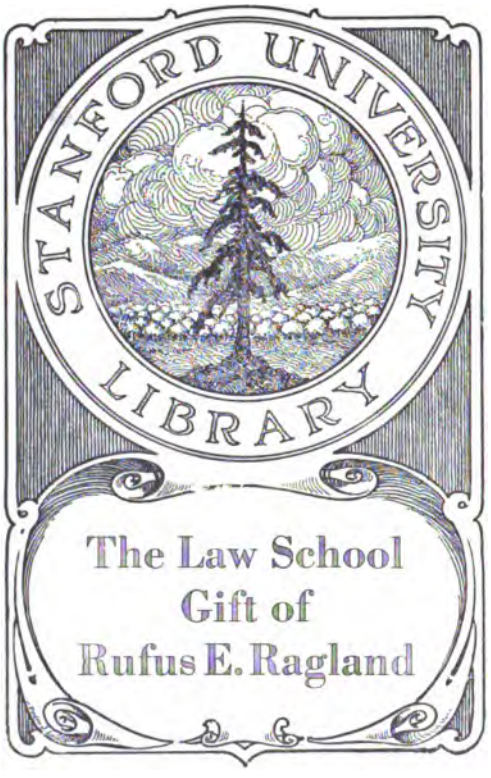
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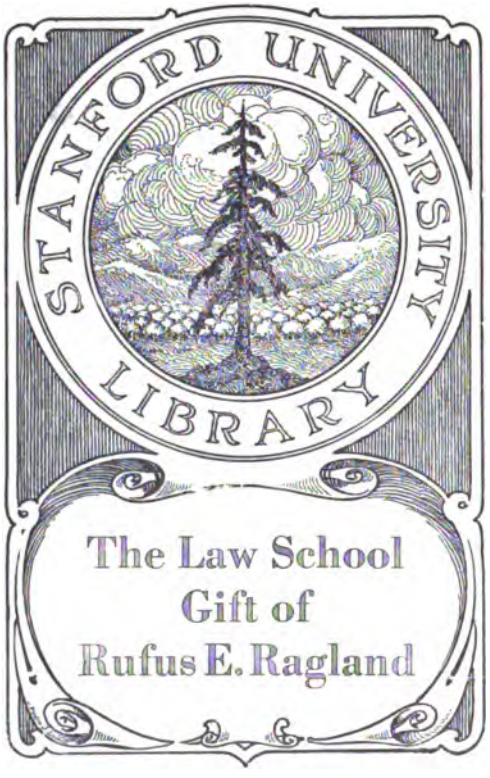
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THE LAW

OF

TRADE AND LABOR COMBINATIONS

AS APPLICABLE TO

BOYCOTTS, STRIKES, TRADE CONSPIRACIES, MONOPOLIES, POOLS, TRUSTS, AND KINDRED TOPICS

BY

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AUTHOR OF

"THE LAW OF LIFE INSURANCE"

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PREFACE.

The comparative suddenness with which Trade and Labor Combinations, in their more recent forms, have been forced upon the attention of the courts, seems to have resulted in a deplorable confusion and conflict in the decisions, with reference to fundamental principles and their application. A writer upon a branch of the law wherein such principles and application have long been clearly established, has it almost exclusively for his function to merely register or formulate what has already been declared by the courts. But a proper performance of my present task has seemed to me to imperatively demand much more than this. I think it not too much to say, that thus far the fundamental principles to be applied in determining the legality of Trade and Labor Combinations and their acts, have not been apprehended at all, or at any rate have failed to secure general recognition.

By way of clearing the ground I have herein introduced, for the first time, the fundamental classification of *Combinations Producing Private Injury* and *Combinations Producing Public Injury*. A clear apprehension of the reason of this classification will suffice of itself to dissipate much of the fog and mist that have hitherto hovered about the groundwork of our topics.

The confusion and conflict in the decisions relating to Combinations Producing Private Injury is, as I have repeat-

edly endeavored to point out, principally caused by the attempts to give effect to *intent* and *combination* as elements of civil liability. Happily some courts in this country have already repudiated them as such elements, and it is to be hoped that the notable decision made by the House of Lords in December, 1897, in the case of *Allen v. Flood*, will prove to be the deathblow, in this country as well as in England, of the doctrine giving effect to *intent*. Similar observations will apply to the doctrine giving effect to *combination*, which has likewise been recently repudiated in England, though not as yet by the court of last resort.

I have herein presented for the first time, as the fundamental and universal test of civil liability for an act of a trade or labor combination, *whether it is the natural incident or outgrowth of some existing lawful relation*. I may say in passing that the same test seems to me to furnish the essential element of the proper definition of a *tort*. After I had evolved this test as the only satisfactory one, it was gratifying to discover that, as a result of the elaborate discussions in *Allen v. Flood*, the majority of the court had reached what I may perhaps call an adumbration of, or approximation to, the test as I have stated it.

Probably the portion of the work devoted to Combinations Producing Public Injury will be of greater interest to the profession generally. Only within about the last ten years have these combinations, variously designated as "monopolies," "trusts," and so on, been frequently presented to the consideration of the courts. The investigations carried on in 1888 by committees appointed by the United States House of Representatives, by the New York Senate, and by the Canadian House of Commons, substantially mark the com-

mencement of the epoch of the development of the law applicable to these combinations. In 1889 were enacted the first "anti-trust laws," and such now exist in two-thirds of the States and Territories, besides the Federal legislation on the subject. Since that time the development of the law in this country, as measured by the number of decisions, has been rapid, though, as I have endeavored to point out, the legal status of these combinations has not yet been clearly defined by the English courts.

Yet, as with reference to the law of Combinations Producing Private Injury, it may be said here that, notwithstanding the comparatively large number of decisions, there is as yet a deplorable conflict and confusion as to fundamental principles and their application. As I have endeavored to point out, this result is due to at least two causes: one, the fallacious supposition that the doctrine against restrictions upon competition is based upon or a development of that against contracts in restraint of trade; the other, the failure to establish or seek to establish any fundamental test of the legality of such restrictions. I have endeavored to make plain what is the basis of the present doctrine against such restrictions, and to point out the existence of two imperfectly recognized tests of liability — *the test of extent* and *the test of reasonableness.*

Many of the decisions covered by the second portion of the work involve the construction of the so-called "anti-trust acts," and it will doubtless be frequently found desirable to obtain ready reference to all the decisions directly construing the anti-trust laws of a particular jurisdiction. Although such decisions will be found scattered throughout this portion of the work, each in connection with its appropriate

topic, yet in the index will be found grouped references to all the decisions directly construing the anti-trust laws of a particular jurisdiction, thus, under "Federal anti-trust laws" or "Texas anti-trust laws."

Although the number of *decisions* cited herein is comparatively small, a reference to the number of *citations*, as given in the table of cases, may furnish a suggestion of the amount of labor involved in analyzing these decisions. Indeed, at this stage of the development of the law on these subjects, it is the function of the text-writer to very elaborately analyze a comparatively small number of decisions. As in course of time fundamental principles and their application become established, the number of decisions calling for citation by the text-writer will of course increase, but individual decisions will require less attention.

I have paid no special attention to the economic, as distinguished from the purely legal, aspect of restrictions upon competition. To those desirous of studying the economic aspects, I commend Von Halle's work on "Trusts or Industrial Combinations and Coalitions in the United States," published in 1895. It contains what appears to be an exhaustive bibliography of the subject, also a "partial list of trade combinations and coalitions achieved or attempted, and of the commodities covered by them in the United States." Much information of interest and value is also contained in Stickney's "State Control of Trade and Commerce," published in 1897.

FREDERICK H. COOKE.

120 Broadway, Borough of Manhattan,
New York City, October, 1898.

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THE LAW

OF

TRADE AND LABOR COMBINATIONS.

PART I.

COMBINATIONS PRODUCING PRIVATE INJURY.

§ 1. General liability for injury to another.— The existence in this world of numerous human beings, most of them in close proximity to one another, gives rise to the eternal and universal conflict between the interests of one's self and those of others. Law, both human and divine, is concerned with the establishment of rules to harmonize these conflicting interests. In this treatise we are specially concerned with this conflict as it is produced in the course of strictly trade or commercial relations. But there seem to be no legal burdens or restrictions placed upon a trader, merely by reason of his being a trader. Not merely to trade relations, but to all the other relations in life wherein exists the possibility of conflict between the interests of one's self and those of others,[1] applies the doctrine long since established, that, "*in all cases* where a man has a temporal loss or damage by the wrong of another, he may have an action upon the case to be repaired in damages."[2] The application of

[1] See remarks of Bowen, J., in Mogul S. S. Co. v. McGregor, 23 L. R. Q. B. D. 598, 614 (1889); and article by J. H. Wigmore in 21 Am. Law Rev. 521 (1887).

[2] 1 Comyn's Digest, Action upon the Case, p. 278, cited in Walker v. Cronin, 107 Mass. 555, 562 (1871). So far as injury results from *words*, the rule on this subject is closely related to the law of libel. In Hollenbeck v. Ristine, — Iowa,

this doctrine to acts of purely physical violence, or acts producing fear of violence, to person or property, is comparatively easy. Recently the idea has gained currency that the doctrine applies to protect not only property, but "business."[1] But the cases of alleged interference with "business,"

—; s. c., 75 N. W. Rep. 355 (1898), it was held actionable to write a letter to the plaintiff's employer resulting in his discharge from employment, even on the assumption that the letter was not defamatory, so as to sustain a technical action for libel.

[1] Barr v. Essex Trades Council, 53 N. J. Eq. 101, 112; s. c., 30 Atl. Rep. 881 (1894; business of publishing newspaper, including the right to use "plate" matter therein); Van Horn v. Van Horn, 52 N. J. Law, 284; s. c., 20 Atl. Rep. 485 (1890); Same v. Same, 56 N. J. Law, 318; s. c., 28 Atl. Rep. 669 (1894); State v. Donaldson, 32 N. J. Law, 151, 155 (1867); State v. Stewart, 59 Vt. 273, 289; s. c., 9 Atl. Rep. 559 (1887); State v. Glidden, 55 Conn. 46, 71; s. c., 8 Atl. Rep. 890 (1887; business of publishing newspaper); Crump v. Commonwealth, 84 Va. 927, 934; s. c., 6 S. E. Rep. 620 (1888); Doremus v. Hennessy, 62 Ill. App. 391, 405 (1895); Nashville, Chattanooga, etc. Ry. Co. v. McConnell, 82 Fed. Rep. 65, 80 (Cir. Ct. Tenn., 1897); Davis v. Zimmerman, 91 Hun, 489; s. c., 36 N. Y. Suppl. 303 (1895); Jackson v. Stanfield, 137 Ind. 592, 613; s. c., 36 N. E. Rep. 345 (1894); Bowen, J., in Mogul S. S. Co. v. McGregor, 23 L. R. Q. B. D. 598, 614 (1889); Moores v. Bricklayers' Union, 7 Ry. & Corp. L. J. 108 (Super. Ct. Cinn., 1889). As instances of interference with business, held to be unlawful, the following are cited by Bowen, J., in the case just cited: The intentional driving away of customers by show of violence, Tarleton v. McGawley, Peake, N. P., 205 (1793); the obstruction of actors on the stage by preconcerted hissing, Clifford v. Brandon, 2 Campbell, N. P. 358 (1810); Gregory v. Duke of Brunswick, 6 Manning & Gr. 205 (1843); the disturbance of wild fowl in decoys by the firing of guns, Carrington v. Taylor, 11 East, 571 (1809); Keeble v. Hickeringill, Id. 574, note (1706); the impeding or threatening servants or workmen, Garret v. Taylor, Cro. Jac. 567 (1620). But in State v. Donaldson, 32 N. J. Law, 151, 155 (1867), combining to induce the discharge of fellow-employees by the announcement of an intention to quit employment, was held not indictable as "an injury to trade" under the statute, the court saying: "It is true that, at a far remove, an injury to an individual manufacturer may affect trade injuriously; but, in the same sense, so it is true, will an injury inflicted on a consumer of manufactured articles. But it is not this undesigned and incidental damage which is embraced within the statutory denunciation." See, generally, as to liability for wrecking and breaking up a business, McCartney v. Berlin, 31 Neb. 411; s. c., 47 N. W.

when analyzed, resolve themselves either into mere cases of injury or threat of injury to person or property (the additional category of injury to business being of course unnecessary as to such cases), or into mere cases of inducing a refusal to deal. In other words, the introduction of the term "injury to business" serves to make more plausible the doctrine that merely inducing a refusal to deal is unlawful. But, in the view we take, an injury to "business" has no independent existence.[1]

Rep. 1111 (1891); Murray v. McGarigle, 69 Wis. 483; s. c., 34 N. W. Rep. 522 (1887). Compare Smith v. Nippert, 76 Wis. 86; s. c., 44 N. W. Rep. 846 (1890). For statutes bearing on the subject, see Appendix. In State v. Glidden, above, it was pointed out that the injury was not only to the business of the newspaper publisher, but to that of his employees — the fellow-workmen of the parties offending. See Farmers' Loan & Trust Co. v. Northern Pacific R. R. Co., 60 Fed. Rep. 803, 816 (Cir. Ct. Wis., 1894). As to whether the existence of a combination illegal as in restraint of competition furnishes ground for an action by a third party, see § 29.

[1] This seems to be in substantial accord with the view taken in Allen v. Flood, L. R. App. Cas. (1898), 1, where Lord Herschell (p. 133, and see views of Lord Davey to same effect, p. 173) vigorously disputes the proposition that "every man has a right to pursue his trade or calling without molestation or obstruction, and that any one who by any act, though it be not otherwise unlawful, molests or obstructs him, is guilty of a wrong unless he can show lawful justification or excuse for so doing." After discussing authorities cited as supporting this proposition, it is said (p. 137): "In all of them the act complained of was in its nature wrongful: violence, menaces of violence, false statements. . . . The act was not wrongful merely because it affected the man in his trade, though it was this circumstance which occasioned him loss;" and again (p. 138): "I do not doubt that every one has a right to pursue his trade or employment without "molestation" or "obstruction," if those terms are used to imply some act in itself wrongful. This is only a branch of a much wider proposition, namely, that every one has a right to do any lawful act he pleases without molestation or obstruction. If it be intended to assert that an act not otherwise wrongful always becomes so if it interferes with another's trade or employment, and needs to be excused or justified, I say that such a proposition, in my opinion, has no solid foundation in reason to rest upon." See criticism of remarks of Bowen, J., in Mogul S. S. Co. v. McGregor, 23 L. R. Q. B. D. 598, 613 (1889).

§ 2. Effect of presence of intent to injure.— Great confusion and conflict in the decisions relating to the legality of trade and labor combinations have resulted from the introduction of intent to injure, as constituting an element of civil liability. It is clear that an injury may be actionable, though without the existence of the slightest intent to injure.[1] But, on the other hand, supposing an act producing injury to be otherwise *damnum absque injuria*, and to give the injured party no right of action, is such a right of action created by the circumstance that the act was done with intent to injure? On this point there is confusion and conflict among the authorities, and judging from them it would seem to have been said with truth[2] that "the English law, which in its earlier stages began with but an imperfect line of demarcation between torts and breaches of contract, presents us with no scientific analysis of the degree to which the intent to harm, or, in the language of the civil law, the *animus vicino nocendi*, may enter into or affect the conception of a personal wrong." Nevertheless, until recently at least, the weight of opinion seems to have favored the view that no right of action is created under these conditions.[3] But re-

[1] As in case of trespass and conversion. See Pollock on Torts, p. 9.

[2] By Bowen, J., in Mogul S. S. Co. v. McGregor, 23 L. R. Q. B. D. 598, 613 (1889). That the *animus vicino nocendi* did so enter into the conception of a wrong as viewed by the Roman law, see Pollock on Torts, p. 186.

[3] This is now the established law in England. The point was elaborately discussed in Allen v. Flood, L. R. App. Cas. (1898), 1. For facts see § 12. Here it was said by Lord Watson (p. 92): "The existence of a bad motive, in the case of an act which is not in itself illegal, will not convert that act into a civil wrong for which reparation is due." So by Lord Shand (p. 167): "The exercise by a person of a legal right does not become illegal because the motive of action is improper or malicious." See also p. 171. To what singular results the doctrine recognizing the efficacy of evil motive might lead, even supposing it to be limited to cases of interference with a man's trade or employment, is very forcibly pointed out by Lord Watson (p. 100). On this point such decisions as Bowen v. Hall, 6 L. R. Q. B. D. 333 (1881), and Temperton v. Russell, 1 L. R. Q. B. (1893), 715, so far as they hold or declare to the contrary, are overruled. Allen v. Flood was followed on this point in Huttley v. Simmons, 1 L. R. Q. B.

cently, and especially in connection with the determination of the legality of acts of trade and labor combinations, the doctrine seems to have gained ground that an act producing injury, though otherwise giving the injured party no right of action, may be actionable if done with an intent to do the injury.[1] The confusion and uncertainty resulting from bring-

(1898), 181; Ajello v. Worsley, 1 L. R. Ch. (1898), 274. This view is also very forcibly and elaborately contended for in Payne v. Western & Atlantic R. R. Co., 13 Lea (Tenn.), 507 (1884); Chambers v. Baldwin, 91 Ky. 121; s. c., 15 S. W. Rep. 57 (1891); Boyson v. Thorn, 98 Cal. 578; s. c., 33 Pac. Rep. 492 (1893); s. p., Bohn Manuf. Co. v. Hollis, 54 Minn. 223; s. c., 55 N. W. Rep. 1119 (1893); Ulery v. Chicago Live-stock Exchange, 54 Ill. App. 233, 241 (1894); People v. Davis, 57 Alb. Law Jour. 170 (Cook Co., Ill., Crim. Court, 1898). See Rogers v. Evarts, 17 N. Y. Suppl. 264 (Sup. Ct. Sp. T. 1891); Commonwealth v. Hunt, 4 Metc. (Mass.) 111, 133, 134 (1842); Lough v. Outerbridge, 143 N. Y. 271, 282; s. c., 38 N. E. Rep. 292 (1894). For discussion of cases of malicious prosecution and libel and slander, see Allen v. Flood, above (pp. 125, 172).

[1] This view is indicated in Walker v. Cronin, 107 Mass. 555, 562 (1871), where, after stating the rule allowing an action for "loss or damage by the wrong of another" (see p. 1, note 2), it is added: "The *intentional* causing of such loss to another, without justifiable cause, and *with the malicious purpose to inflict it*, is of itself a wrong." The doctrine is thus forcibly stated in State v. Glidden, 55 Conn. 46, 71; s. c., 8 Atl. Rep. 890 (1887), where a conspiracy was held unlawful as designed to injure the business of a newspaper: "The motive was a selfish one: to gain an advantage *unjustly* and at the expense of others; and *therefore* the act was legally corrupt. As a means of accomplishing the purpose, the parties intended to harm the company, and therefore it was malicious." Other authorities upholding the view that intent is an element to be considered in determining liability are Moores v. Bricklayers' Union, 7 Ry. & Corp. L. J. 108 (Super. Ct. Cinn., 1889); Toledo, Ann Arbor, etc. Ry. Co. v. Pennsylvania Co., 54 Fed. Rep. 730, 737 (Cir. Ct. Ohio, 1893); Thomas v. Cincinnati, N. O. & T. P. Ry. Co., 62 Fed. Rep. 803, 818 (Cir. Ct. Ohio, 1894); Barr v. Essex Trades Council, 53 N. J. Eq. 101, 116; s. c., 30 Atl. Rep. 881 (1894); Continental Ins. Co. v. Board of Underwriters, 67 Fed. Rep. 310, 320 (Cir. Ct. Cal., 1895); Doremus v. Hennessy, 62 Ill. App. 391, 405 (1895); Chesley v. King, 74 Me. 164 (1882). This case last cited contains a very instructive discussion of the general question; but see Heywood v. Tillson, 75 Me. 225 (1883). See also United States v. Debs, 64 Fed. Rep. 724, 765 (Cir. Ct. Ill., 1894), affirmed in Re Debs, 158 U. S. 564, 598; s. c., 15 Supm. Ct. Rep. 900 (1895). For an application of the rule of liability

ing so subtle an element into consideration have frequently been recognized, and in our view there is absolutely no necessity for it. In this view, in determining whether a right of action arises from an act producing injury, attention should be directed, not at all to the intent with which the act was done, but to the existing relation, if any, of the party doing the injury, to the conditions out of which arose the act. In other words, the test of liability is *whether the act was the natural incident or outgrowth of some existing lawful relation.*[1] Perhaps the most striking and suggestive

for the natural and inevitable consequences of one's acts, see Barr v. Essex Trades Council, above (p. 117), a case of the boycott of a newspaper.

[1] Although, so far as I know, this view has never before been formulated, the court, in the leading case of Allen v. Flood, L. R. App. Cas. (1898), 1, seem to have come very near an apprehension of it, as not confined in its application to any particular relation, such as that of trade competitor, but extending to lawful relations generally. Thus, Lord Herschell (p. 140) explains the decision in Mogul S. S. Co. v. McGregor, below, as not resting on the narrow basis that "the law sanctions acts which are done in furtherance of trade competition," "but rather on this: that *the acts by which the competition was pursued were all lawful acts; that they were acts not in themselves wrongful,* but a mere exercise of the right to contract with whom, and when, and under what circumstances and upon what conditions they pleased." And some of the judges who delivered the numerous opinions in Mogul S. S. Co. v. McGregor seem to us to have been not far from such clear apprehension. Thus, Bowen, J., when (23 L. R. Q. B. D. 598, 613) he says that an intentional act producing damage is actionable if done *without just cause or excuse.* This is very near saying that it is actionable, *if not the incident or outgrowth of some existing lawful relation.* Still nearer to the truth does he come when he says (p. 618), "If it was *bona fide* done *in the use of a man's own property, in the exercise of a man's own trade,* such legal justification would, I think, exist not the less because what was done might seem to others to be selfish or unreasonable. But such legal justification would not exist when the act was merely done with the intention of causing temporal harm, *without reference to one's own lawful gain or the lawful enjoyment of one's own rights.*" So, in Barr v. Essex Trades Council, 53 N. J. Eq. 101, 117; s. c., 30 Atl. Rep. 881 (1894), it is said that "the test is, has the injury been inflicted intentionally *and without legal excuse?*" To similar effect, Macauley v. Tierney, 19 R. I. 255; s. c., 33 Atl. Rep. 1 (1895). Compare what is said in Walker v. Cronin, 107

illustration of such a relation is that of the owner of tangible property, especially real estate. It is the generally-accepted doctrine that the owner of land is not liable for an injury resulting from an act done upon his own land, merely because the act was done with intent to do the injury.[1] In such case the act is merely an incident or outgrowth of the existing lawful relation of owner. It is a mistake, however, to suppose that the doctrine is confined in its application to the relation of owner of land.[2] Thus, the existence of the re-

Mass. 555, 563 (1871), as to "acting in the lawful exercise of *some distinct right* which furnished the defense of *a justifiable cause*." See, generally, Cooley on Torts (2d ed.), p. 93. Recent suggestive discussions, more or less closely bearing on this subject, will be found in articles by Judge O. W. Holmes, on "Privilege, Malice and Intent," in 8 Harv. Law Rev. 1 (1894); by J. H. Wigmore, on "The Tripartite Division of Torts," Id. 200 (1894); on "A General Analysis of Tort Relations," Id. 377 (1895); and on "The Boycott and Kindred Practices as Ground for Damages," 21 Am. Law Rev. 509 (1887). The last-mentioned article is rich in suggestion, but the learned author, throughout his discussion of "interference with relations," seems to us to fall into the common error of treating the subject from the standpoint of the relation of *the party injured*, instead of from the standpoint of *the party doing the injury*. See also article by E. Freund, on "Malice and Unlawful Interference," in 11 Harv. Law Rev. 449, 463 (1898). Compare, as to doctrine of *privilege* in libel, Hollenbeck v. Ristine, — Iowa, —; s. c., 75 N. W. Rep. 355 (1898).

[1] Phelps v. Nowlen, 72 N. Y. 39 (1878); Mayor, etc. of Bradford v. Pickles, L. R. App. Cas. (1895), 587. See, however, Chesley v. King, 74 Me. 164 (1882). That, for instance, creating noises on one's land is not a natural incident or outgrowth of the relation of owner of land, see Allen v. Flood, L. R. App. Cas. (1898), 1, 101, commenting on Keeble v. Hickeringill, 11 East, 574, note (1706), a case where firing a gun on one's own land frightened wild fowl from a neighbor's decoy. It is further said (p. 133) that Keeble v. Hickeringill may be "explained by the circumstance that, if the defendant merely fired on his own land, *in the ordinary use of it*, his neighbor could make no complaint, whilst if he was not firing for any legitimate purpose *connected with the ordinary use of land*, he might be held to commit a nuisance." What is this but saying that the act of firing, though done upon the land, was not *the natural incident or outgrowth of the existing lawful relation as owner of such land*?

[2] This may have been the view of the court in Moores v. Bricklayers' Union, 7 Ry. & Corp. L. J. 108 (Super. Ct. Cinn., 1889), citing dissenting opinion in Capital & Coun-

lation of party to a lawful contract enables such a party to enforce or terminate the contract according to its provisions, without reference to the presence of intent to injure another party to the contract or a third person.[1] In this view the same doctrine should apply to the existing relation of competitor in trade, of employer, and of employee. In the line of what we have already stated, the failure to recognize and apply this doctrine seems to be largely responsible for the confusion and conflict in the decisions relating to the legality of trade and labor combinations. It will be our endeavor in this part of this treatise to show its application to such cases. Having thus seen that an act, though done with intent to injure, is lawful if the natural incident or outgrowth of some lawful relation, we may define, as *malicious acts*, acts done with *malice*, or with intent to do injury, *in the absence of any existing lawful relation of which the act is a natural incident or outgrowth.*[2]

ties Bank v. Henty, 7 L. R. App. Cas. 741, 766 (1882).

[1] Thus, in Raycroft v. Tayntor, 68 Vt. 219; s. c., 35 Atl. Rep. 53 (1896), it was held that no action would lie for procuring a discharge from employment by threatening the employer that the defendant would terminate a contract that he had the right to terminate at any time. To the same rule seems referable Beechley v. Mulville, 102 Iowa, 602; s. c., 70 N. W. Rep. 107 (1897), where an action by a member of a combination among fire insurance companies and agents to fix rates was held not maintainable as for a conspiracy to destroy the plaintiff's business as an insurance agent, merely because of the combined action of the defendants to enforce the rules and penalties against him, as by imposing fines and revoking agencies.

[2] It seems a sufficient justification of the view we have advanced that we are thereby enabled to avoid the deplorable confusion into which courts have fallen in the attempt to define malice while ignoring the existing relation of the party doing the act. Thus, we need not wonder to find Lord Macnaghten in Allen v. Flood, L. R. App. Cas. (1898), 1, 144, saying, with reference to the word "maliciously:" "Sometimes I rather doubt whether I quite understand that unhappy expression myself." In Flood v. Jackson, 2 L. R. Q. B. (1895), 21, the court had an admirable opportunity to decide the case on the issue whether the act complained of was the natural incident or outgrowth of the relation of the defendant as a member of or representing a large body of employees with common interests. (See § 12.) But the court

§ 3. The doctrine of criminal conspiracy.— The comparatively recent introduction of the doctrine that the fact of combination creates a civil liability where otherwise it would not exist, makes it desirable to obtain a clear idea of the scope of the doctrine of criminal conspiracy, from which the above-mentioned doctrine seems to have been derived. A consideration of the authorities on this subject may well lead us to the conclusion that "no branch of the law of England is more uncertain and ill-defined than the law of criminal conspiracy."[1] A survey of the historical conditions will

entirely ignore the existence of this relation, using (through Lord Esher) the following somewhat remarkable language: "We have been invited to define malice. One cannot do so any more than one can define fraud, and I certainly shall not attempt it. *Every one knows what is meant by a man acting maliciously.* The only recognized tribunal that can decide whether an act is or is not malicious is a jury." It would seem then that the statement that "every one knows what is meant by a man acting maliciously" should be qualified as follows: "Every one *except Lord Esher* knows," etc. In the same case, however, Lopes, J., cautiously stated "as being *applicable to the present case*, that when a person wilfully does an act to the injury of another *without any lawful cause*, that is evidence of malice." Instead of "without any lawful cause," it would have been better to say "in the absence of any existing lawful relation of which the act is a natural outgrowth or relation." But on reversal of this decision in Allen v. Flood, L. R. App. Cas. (1898), 1 (see p. 4, above), this opinion of Lord Esher was deservedly condemned, it being said by Lord Herschell (p. 118): "I can imagine no greater danger to the community than that a jury should be at liberty to impose the penalty of paying damages for acts which are otherwise lawful, because they choose, without any legal definition of the term, to say that they were malicious. No one would know what his rights were." Compare statement of Bowen, J., in Mogul S. S. Co. v. McGregor, 23 L. R. Q. B. D. 598, 613 (1889), that "such intentional action taken *without just cause or excuse* is what the law calls a malicious wrong;" and see p. 6, above. See also Bromage v. Prosser, 4 Barnewall & C. 247, 255 (1825); Allen v. Flood, above (pp. 94, 171).

[1] K. E. Digby, in article in 6 Law Quart. Rev. 128 (1890), on "The Law of Criminal Conspiracy in England and Ireland." See reply by J. G. Butcher, Id. 247 (1890), and further article by Mr. Digby, Id. 363 (1890). So it was said in People v. Fisher, 14 Wend. 9 (1835), that "the offense of conspiracy seems to have been left in greater uncertainty by the common law than most other offenses." As to statutes modifying common-law doctrine, see Appendix.

assist us to understand the origin of the doctrine of criminal, as distinguished from civil, liability for conspiracy. When conspiracies to overthrow governments were more frequent and dangerous than at present, the governmental authorities found it desirable to "nip in the bud" such plots, and punish the conspirators before the conspiracy could be carried into execution. The desire to do this under form of law, if it did not actually produce, seems at least to have made it easier to establish, the doctrine that "a combination to commit any crime was punishable, although the crime had not been executed,"[1] the doctrine being extended to include cases where the acts proposed were not criminal.[2] A commonly accepted definition of a conspiracy is that "it is a combination of two or more persons, by some concerted action, to accomplish some criminal or unlawful purpose, or to ac-

[1] This doctrine appears in English jurisprudence as early as the fourteenth century, though it does not seem to have been firmly established until the seventeenth. In that period its convenience in obtaining convictions for treason was fully demonstrated. Wright on Criminal Conspiracies and Agreements, pp. 6, 7. These applications of the doctrine were vividly before the minds of those who conducted the Revolutionary war and founded our government. "No person shall be convicted of treason, unless on the testimony of two witnesses to the same *overt act*, or on confession in open court." U. S. Const., art. 3, § 3.

[2] This extension was recognized in Reg. v. Parnell, 14 Cox C. C. 508 (1881), and seems to have been so generally in this country. State v. Stewart, 59 Vt. 273; s. c., 9 Atl. Rep. 559 (1887); Commonwealth v. Hunt, 4 Metc. (Mass.) 111, 123 (1842); Carew v. Rutherford, 106 Mass. 1, 10 1870). Compare, however, Wright on Criminal Conspiracies and Agreements, p. 48, where, as the result of an elaborate discussion, it is concluded that "there is a great preponderance of authority in favor of the proposition that, *as a rule*, an agreement or combination is not criminal unless it be for acts or omissions (whether as 'ends' or as 'means') which would be criminal apart from agreement." See Arthur v. Oakes, 24 U. S. App. 239, 263; s. c., 63 Fed. Rep. 310, 325 (7th Cir., 1894), as to Wisconsin statutes said to embody "the principle that a combination or conspiracy of two or more persons to injure the rights of others is illegal." But these statutes create a criminal liability, and the reference to them by the court only adds to the evidence that the court, as we shall show elsewhere (see § 4), failed to keep in mind the distinction between *criminal* and *civil* liability for conspiracy.

complish some purpose, not in itself criminal or unlawful, by criminal or unlawful means."[1] The question when, within the meaning of this definition, an act is unlawful, has been one of considerable difficulty. It seems clear that not all unlawful acts are included.[2] But, without further discussing the point, we content ourselves with the suggestion that seems sufficient to cover the authorities, namely, that the doctrine extends to agreements *to deprive another of his liberty or property.*[3] In any given case the decision is likely

[1] Commonwealth v. Hunt, 4 Metc. (Mass.) 111, 123 (1842). See also Carew v. Rutherford, 106 Mass. 1, 10 (1870); State v. Stewart, 59 Vt. 273, 286; s. c., 9 Atl. Rep. 559 (1887). In Commonwealth v. Hunt, a criminal conspiracy was held not charged in an indictment alleging that "the defendants, with others unknown, did assemble, conspire, confederate and agree together, not to work for any master or person who should employ any workman not being a member of a certain club, society or combination called the Boston Journeymen Bootmakers' Society, or who should break any of their by-laws, unless such workmen should pay to said club such sum as should be agreed upon as a penalty for the breach of such unlawful rules, etc.; and that by means of said conspiracy they did compel one W., a master cordwainer, to turn out of his employ one H., a journeyman bootmaker, etc., in evil example," etc. The court say (p. 131): "The averment of a conspiracy is simply an averment of an agreement amongst themselves not to work for a person who should employ any person not a member of a certain association. It sets forth no illegal or criminal purpose to be accomplished, nor any illegal or criminal means to be adopted for the accomplishment of any purpose. It was an agreement as to the manner in which they would exercise an acknowledged right to contract with others for their labor." The averment as to compelling W. to turn H. out of his employ was held mere matter of aggravation that could not supply the want of allegation of a conspiracy, or, regarding it a substantive charge, was held not to allege a criminal conspiracy, in view of the connection in which it was used. The court, however, interpreted the agreement as not covering the case of quitting employment on breach of a contract for a fixed period, or inducing others to so quit, saying: "If a large number of men, engaged for a certain time, should combine together to violate their contract and quit their employment together, it would present a very different question."

[2] See State v. Glidden, note 3, below (p. 70); Commonwealth v. Hunt, note 1, above (p. 124).

[3] State v. Glidden, 55 Conn. 46, 71; s. c., 8 Atl. Rep. 890 (1887), where see the ordinary definitions discussed and criticised. In Commonwealth

to be governed by the local law applicable.[1] It remains to point out that the doctrine has never been carried to the extent of creating a *civil* liability for a conspiracy not carried into effect, though it seems to have had an influence in developing the doctrine presently to be considered, that the fact of combination creates a civil liability where otherwise it would not exist.

§ 4. Combination as element of civil liability.— As we have just seen, the doctrine seems well established that a combination to commit a crime, or (with certain limitations)

v. Hunt, note 1, above (p. 121), the injuries included in the definition are described as to "the public, or portions or classes of the community, or *even to the rights of an individual.*" In State v. Stewart, below (p. 287), are included combinations that "seek to restrain trade or tend to the destruction of the material prosperity of the country" as "working injury to the public." Thus, in King v. Eccles, 3 Douglas, 337 (1783), the indictment sustained was for a conspiracy to impoverish a person and to deprive and hinder him from following and exercising his trade. In Crump v. Commonwealth, 84 Va. 927; s. c., 6 S. E. Rep. 620 (1888), to injure persons in their business by making threats to their customers. In State v. Stewart, 59 Vt. 273; s. c., 9 Atl. Rep. 559 (1887), to prevent, hinder and deter a corporation from employing certain persons, and to frighten them away from such employment. Here the subject is very elaborately discussed. After declaring it to be a criminal conspiracy to combine to coerce the free choice of every man to employ his talents, industry and capital as he pleases, it is said (p. 289): "While such conspiracies may give to the individual directly affected by them a private right to action for damages, they at the same time lay a basis for an indictment on the ground that the state itself is directly concerned in the promotion of all legitimate industries and the development of all its resources, and owes the duty of protection to its citizens engaged in the exercise of their callings." This language was approved and applied in Hopkins v. Oxley Stave Co., 49 U. S. App. 709, 719; s. c., 83 Fed. Rep. 912, 919 (8th Cir., 1897). In State v. Dyer, 67 Vt. 690; s. c., 32 Atl. Rep. 814 (1894), the conspiracy was not only to induce an employer to discharge an employee, but to prevent him from obtaining other employment. The inducing his discharge was, according to the doctrine stated in § 10, an unlawful act, but the preventing him from obtaining other employment was not so, irrespective of the means employed. As to the criminality of combinations in restraint of competition, see § 28.

[1] Commonwealth v. Hunt, 4 Metc. (Mass.) 111, 121 (1842).

any other unlawful act, subjects the members of the combination to *criminal* liability, though the act proposed be not done. But, at least until recently, it seems to have been equally well established that under these conditions no civil liability exists, or, as it has been said, "an action will not lie for the greatest conspiracy imaginable, if nothing be put in execution."[1] If, however, in pursuance of the conspiracy,

[1] Savile v. Roberts, 1 Lord Raymond, 374 (1697); Hutchins v. Hutchins, 7 Hill (N. Y.), 104, 108 (1845); Adler v. Fenton, 24 How. (U. S.) 407, 410 (1860); Toledo, Ann Arbor, etc. Ry. Co. v. Pennsylvania Co., 54 Fed. Rep. 730, 739 (Cir. Ct. Ohio, 1893); Brewster v. Miller, —— Ky. ——; s. c., 41 S. W. Rep. 301 (1897); Mogul S. S. Co. v. McGregor, 23 L. R. Q. B. D. 598, 616 (1889); Temperton v. Russell, 1 L. R. Q. B. (1893), 715. In United States v. Elliott, 64 Fed. Rep. 27, 32 (Cir. Ct. Mo., 1894), it is said of the decision in Arthur v. Oakes, 24 U. S. App. 239; s. c., 63 Fed. Rep. 310 (7th Cir., 1894), modifying Farmers' Loan & Trust Co. v. Northern Pacific R. R. Co., 60 Fed. Rep. 803 (Cir. Ct. Wis., 1894), that "no public decision has perhaps been so much misunderstood, or ignorantly or intentionally misrepresented and perverted." But the confusion produced by this decision is, we submit, largely due to the failure of the court to keep in mind this well established distinction between *criminal* and *civil* liability for conspiracy. Here, though an injunction against employees of the receivers of a railroad, restraining them from "*quitting the service* of the said receivers with or without notice," was refused, yet one was allowed against their "*combining and conspiring* to quit with or without notice the service of said receivers, *with the object and intent* of crippling the property in their custody or embarrassing the operation of said railroad." See Re Higgins, 27 Fed. Rep. 443 (Cir. Ct. Tex., 1886). There being nothing objectionable, then, in the mere *quitting* (24 U. S. App. 255), the vice, if any, lay in the *combination and conspiracy to cripple property or embarrass the operation of the railroad.* How came the court to grant this injunction in a *civil* proceeding? The case would have been otherwise if the injunction had been limited to merely "crippling the property, or embarrassing the operation of the road," and it would seem on principle, that the injunction, if proper at all under the circumstances, should have been so limited, specifying, so far as needful (see p. 261), the particular acts of violence desirable to prevent. That the court entirely overlooked the distinction between *civil* and *criminal* liability for conspiracy seems clear from what is thus said (p. 257): "According to the principles of the common law, a conspiracy upon the part of two or more persons, *with the intent*, by their combined powers, to wrong others, *is in itself*

an act is done injurious to any person, the conspirators are civilly liable to him.[1] Quite recently has sprung into recognition the doctrine that an act, entirely lawful if done by a single individual, may be unlawful by reason of being done in pursuance of a combination of individuals to do the same act.[2] According to some authorities, however, the doctrine

illegal, although nothing be done in execution of such conspiracy. This is fundamental in our jurisprudence." Hence the result reached in Arthur *v.* Oakes is that an injunction may be granted against an act which in its civil aspect is entirely lawful. The cases cited by the court to show the *illegality* of the conspiracy are all *criminal* proceedings. See comments on this decision in United States v. Elliott, p. 18, above. In Longshore Printing Co. v. Howell, 26 Oreg. 527, 547; s. c., 38 Pac. Rep. 547 (1894), the court, apparently relying on the reasoning of and authorities cited in Arthur v. Oakes, fall into like confusion of ideas, and conclude that "there is no good reason why civil liabilities may not ensue by reason of a conspiracy to commit that which is made unlawful by statute." So in Elder v. Whitesides, 72 Fed. Rep. 724 (Cir. Ct. La., 1895), Arthur v. Oakes was followed in granting an injunction against a mere conspiracy to prevent the loading or unloading of a vessel except by such labor as might be acceptable to the defendants, but without any overt unlawful act.

[1] Carew v. Rutherford, 106 Mass. 1, 10 (1870); Toledo, Ann Arbor, etc. Ry. Co. v. Pennsylvania Co., 54 Fed. Rep. 730, 739 (Cir. Ct. Ohio, 1893); Van Horn v. Van Horn, 52 N. J. Law, 284; s. c., 20 Atl. Rep. 485 (1890); Temperton v. Russell, 1 L. R. Q. B. (1893), 715.

[2] Toledo, Ann Arbor, etc. Ry. Co. v. Pennsylvania Co., 54 Fed. Rep. 730, 740 (Cir. Ct. Ohio, 1893); Same v. Same, Id. 746 (Cir. Ct. Ohio, 1893; quitting of train by engineer); Moores v. Bricklayers' Union, 7 Ry. & Corp. L. J. 108 (Super. Ct. Cinn., 1889; inducing refusal to deal); Mogul S. S. Co. v. McGregor, L. R. App. Cas. (1892), 25, 38, 45; Cote v. Murphy, 159 Pa. St. 420, 427, 431; s. c., 28 Atl. Rep. 190 (1894). Though not so stated, this seems to be the ground on which Mapstrick v. Range, 9 Neb. 390; s. c., 2 N. W. Rep. 739 (1879), a case of quitting of employment, is sustainable, if at all. See also Consolidated Steel & Wire Co. v. Murray, 80 Fed. Rep. 811, 823 (Cir. Ct. Ohio, 1897); Morris Run Coal Co. v. Barclay Coal Co., 68 Pa. St. 173, 186 (1871); Doremus v. Hennessy, 62 Ill. App. 391, 402 (1895); Barr v. Essex Trades Council, 53 N. J. Eq. 101, 123; s. c., 30 Atl. Rep. 881 (1894); People v. Duke, 19 Misc. (N. Y.) 292 (N. Y. County General Sessions, 1897); Dueber Watch-Case Manuf. Co. v. E. Howard Watch & Clock Co., 35 U. S. App. 16, 29, 38; s. c., 66 Fed. Rep. 637, 645, 651 (2d Cir., 1895). Though not so distinctly stated, the existence of a combination seems largely to have influ-

seems rather to be that *it is easier to show* the illegality of an act when done in pursuance of a combination of individuals to do the same act, than if done by a single individual. In this view the difference is not as to liability, but as to the

enced the decision in Curran v. Galen, 152 N. Y. 33; s. c., 46 N. E. Rep. 297 (1897). The origin of this doctrine is somewhat obscure, but perhaps it may be referred to some remarks in Gregory v. Duke of Brunswick, 6 Manning & Gr. 953, 959 (1844). See Temperton v. Russell, 1 L. R. Q. B. (1893), 715; Moores v. Bricklayers' Union, 7 Ry. & Corp. L. J. 108 (Super. Ct. Cinn., 1889); also p. 16, note 1, below. But although the doctrine, largely American as to development, is professedly based on English decisions, it seems now clear that it has been repudiated in England. Thus, in Huttley v. Simmons, 1 L. R. Q. B. (1898), 181, where an action for conspiring with others to induce a person not to employ the plaintiff was held not maintainable, the court say: "Conspiracy to do certain acts gives a right of action only where the acts agreed to be done, and in fact done, would, had they been without preconcert, have involved a civil injury to the plaintiff." The same result had been reached in Kearney v. Lloyd, 26 L. R. (Ireland), 268 (1889). As indicating the supposed grounds of the doctrine, the following remarks are suggestive: "A man may encounter the acts of a single person, yet not be fairly matched against several." Lord Bramwell, in Mogul S. S. Co. v. McGregor, p. 14, above. "The combination is material in giving the act a different character from a similar act of an individual by reason of its greater, more dangerous and oppressive effect." Moores v. Bricklayers' Union, above. "Any one man, or any of several men, acting independently, is powerless; but, when several combine and direct their united energies to the accomplishment of a bad purpose, the combination is formidable. Its power for evil increases as its numbers increase." State v. Glidden, 55 Conn. 46, 75; s. c., 8 Atl. Rep. 890 (1887). To similar effect, Arthur v. Oakes, 24 U. S. App. 239, 258; s. c., 63 Fed. Rep. 310, 321 (7th Cir., 1894) (as to which see, however, p. 13, above); United States v. Elliott, 64 Fed. Rep. 27, 32 (Cir. Ct. Mo., 1894). So in Toledo, Ann Arbor, etc. Ry. Co. v. Pennsylvania Co., 54 Fed. Rep. 730, 739 (Cir. Ct. Ohio, 1893), involving the legality of a quitting of employment by railroad engineers, it is said: "Ordinarily the only difference between the civil liability for acts done in pursuance of a conspiracy and for acts of the same character done by a single person is in the greater probability that such acts, when done by many in a combination, will cause injury. . . . The difficulty in supposing or stating any civil liability when the acts we have been discussing are done by a single engineer is in the improbability that either by singly refusing to handle the freight he could cause any injury to complainant, or by singly threatening to quit or by quitting he could procure his company to

sufficiency of evidence. In this view also the doctrine seems to be merely a development of the doctrine already considered, that an act otherwise lawful may be made unlawful by an intent to injure. This on the supposition that it is easier to show the intent of an act done in pursuance of a combination of individuals to do the same act, than if done by a single individual.[1] But, without adopting the suggestion that has been made, that the doctrine finds its origin in a mere misconception of the law of criminal conspiracy,[2] we venture to suggest that, until its precise warrant and ground are better defined, it should not be allowed a place in our jurisprudence. It has been especially applied to combinations to refuse to deal (boycotts), and to combinations to quit employment (strikes). But its existence has been thus

do so. But when we suppose that all or nearly all the engineers on the eight different defendant companies combine with their chief to do these unlawful acts for the purpose of injuring complainant, the intended loss becomes, not only probable, but inevitable." See similar observations in State v. Donaldson, 32 N. J. Law, 151 (1867); and compare Thomas v. Cincinnati, N. O. & T. P. Ry. Co., 62 Fed. Rep. 803, 821 (Cir. Ct. Ohio, 1894).

[1] Thus, in Gregory v. Duke of Brunswick, 6 Manning & Gr. 953, 959 (1844), which we have (see p. 15, above) referred to as perhaps the origin of the doctrine, it is said: "The act of hissing in a public theater is *prima facie* a lawful act; and even if it should be conceded that such an act, though done without concert with others, if done from a malicious motive, might furnish a ground of action, *yet it would be very difficult to infer such a motive from the insulated acts of one person unconnected with others.*" So in Moores v. Bricklayers' Union (see p. 15, above), it is said that "the combination is material *in being strong evidence of the malice with which the act is done.*" In this connection we may note a different, though somewhat analogous, ground suggested by Lord Bramwell, in Mogul S. S. Co. v. McGregor (see p. 15, above), that "the act when done by an individual is wrong, though not punishable, because the law avoids the multiplicity of crimes: *de minimis non curat lex;* while, if done by several, it is sufficiently important to be treated as a crime."

[2] Thus, in Bohn Manuf. Co. v. Hollis, p. 17, below (p. 284), it is said of the authorities asserting the doctrine just considered, that "they evidently have their origin in a confused and inaccurate idea of the law of criminal conspiracy, and in failing to distinguish between an unlawful act and a criminal one. It can never be a crime to combine to commit a lawful act." See, however, note 1, above.

vigorously attacked: "What one man may lawfully do singly, two or more may lawfully agree to do jointly. The number who unite to do the act cannot change its character from lawful to unlawful. The gist of a private action for the wrongful act of many is not the combination or conspiracy, but the damage done or threatened to the plaintiff by the acts of the defendants. If the act be lawful, the combination of many to commit it may aggravate the injury, but cannot change the character of the act."[1]

§ 5. Relation of trade competitor as justifying act injuring another.— In all ages those engaged in trade have striven for success at the expense of their rivals. In ruder ages, as indeed still is the case in the newer and comparatively unsettled regions open to trade, traders frequently resort to acts, not alone of fraud, but of violence, even to robbery and murder. Such acts are condemned by the common law of England, as indeed by the law of every civilized nation.[2] There remain, however, many acts which, like

[1] Bohn Manuf. Co. v. Hollis, 54 Minn. 223, 234; s. c., 55 N. W. Rep. 1119 (1893). The same doctrine was applied under similar conditions in Macauley v. Tierney, 19 R. I. 255; s. c., 33 Atl. Rep. 1 (1895), both being cases of refusal to deal. It is contended for with great force and eloquence in the dissenting opinion of Caldwell, J., in Hopkins v. Oxley Stave Co., 49 U. S. App. 709, 736; s. c., 83 Fed. Rep. 912, 930 (8th Cir., 1897). Compare Payne v. Western & Atlantic R. R. Co., 13 Lea (Tenn.), 507, 521 (1884); Lewin v. Welsbach Light Co., 81 Fed. Rep. 904 (Cir. Ct. Pa., 1897); Delz v. Winfree, 80 Tex. 400, 404; s. c., 16 S. W. Rep. 111 (1891); Olive v. Van Patten, 7 Tex. Civ. App. 630; s. c., 25 S. W. Rep. 428 (1894); Continental Ins. Co. v. Board of Underwriters, 67 Fed. Rep. 310 (Cir. Ct. Cal., 1895). In Clemmitt v. Watson, 14 Ind. App. 38; s. c., 42 N. E. Rep. 367 (1895), where it was held not unlawful to cause a co-employee to be thrown out of work by agreeing to quit, the court say: "What each one could rightfully do, certainly all could do if they so desired, especially when their concerted action was taken peaceably, without any threats, violence or attempt at intimidation."

[2] As instances are given "fraud, misrepresentation, intimidation, coercion, obstruction or molestation of the rival or his servants or workmen, and the procurement of violation of contractual relations." Macauley v. Tierney, 19 R. I. 255; s. c., 33 Atl. Rep. 1 (1895). Not all of the instances here given are, however, beyond the realm of debate; for instance, "the procure-

those just considered, are done with intent to injure a trade rival, and yet are generally regarded as entirely lawful.[1] What is the test of separation between these classes? If the doctrine already contended for be correct, namely, that the test of liability for an act producing injury is in no case the intent of the act, but purely whether the act was the natural incident or outgrowth of some existing lawful relation, we may state, by way of application of this doctrine to the relation of competitor in trade, that *the existence of the relation of trade competitor justifies acts that are the natural incident or outgrowth of such relation, whether or not done with the direct intent to injure one's rival.*[2] In this view,

ment of violation of contractual relations." See § 13.

[1] The legality of such acts was very early established. Thus, in a case decided in 1410 (11 Henry 4, fol. 47, pl. 21), referred to frequently in Allen v. Flood, L. R. App. Cas. (1898), 1, and holding that a school-master setting up a school to the damage of an ancient school, whereby the scholars were allured from the old school to come to his, committed no actionable wrong. So it is said in Commonwealth v. Hunt, 4 Metc. (Mass.) 111, 134 (1892): "We think that associations may be entered into, the object of which is to adopt measures that may have a tendency to impoverish another, that is, to diminish his gains and profits, and yet, so far from being criminal or unlawful, the object may be highly meritorious and public-spirited. The legality of such an association will therefore depend upon the means to be used for its accomplishment." To similar effect, Bohn Manuf. Co. v. Hollis, 54 Minn. 223, 233; s. c., 55 N. W. Rep. 1119 (1893); Macauley v. Tierney, p. 17, above. See Walker v. Cronin, 107 Mass. 555, 564 (1871); Curran v. Treleaven, 2 L. R. Q. B. (1891), 560; Mogul S. S. Co. v. McGregor, p. 20, below.

[2] With this statement compare the following language in the dissenting opinion of Holmes, J., in Vegelahn v. Guntner, 167 Mass. 92, 106; s. c., 44 N. E. Rep. 1077 (1896): "The policy of allowing free competition justifies the intentional inflicting of temporal damage, including the damage of interference with a man's business by some means, when the damage is done not for its own sake, but *as an instrumentality in reaching the end of victory in the battle of trade.* In such a case it cannot matter whether the plaintiff is the only rival of the defendant, and so is aimed at specifically, or is one of a class all of whom are hit. The only debatable ground is *the nature of the means by which such damage may be inflicted.*" It was in accordance with this doctrine that in Allen v. Flood, above

acts that are not the natural incident or outgrowth of such relation are not justified. Or we may express the distinction as one between "fair" and "unfair" competition. Thus, the acts of fraud and violence just considered do not, in any proper sense of the words, come under the description of "fair competition," or of "natural incidents or outgrowths" of the relation of trade competitor.[1] On the other hand, there are acts that come so clearly under such description that their legality is generally conceded. We may cite by way of illustration, setting up an opposition line of conveyance, or a rival hotel in the same town, introducing improvements,[2] and generally the manifold devices involved in modern methods of advertising. But there is a border class of cases as to which has existed considerable difference of judicial opinion. It may not be easy to conceive of an act done by a trade competitor that is not only the natural incident or outgrowth of his relation as such, but is also done *purely with intent to injure his rival*, and without any intent to benefit himself. If there are such

(pp. 103, 135), the court condemned Carrington v. Taylor, 11 East, 571 (1809), where a person was held liable for injury resulting from firing shots while in pursuit of his own occupation as hunter of wild fowl. In Ajello v. Worsley, 1 L. R. Ch. (1898), 274, an injunction was refused against a dealer advertising for sale goods manufactured by the plaintiff, though without having such in his possession. The court makes the distinction between the case under consideration, as one of an untrue statement relating to the defendant's own business, and cases of untrue statements regarding the plaintiff's business.

[1] What we may call the doctrine of "unfair competition" is as yet in its infancy. Within the scope of such competition fall a class of cases that increasingly attract attention, and involve what are called in Browne on Trade-marks, "rights analogous to those of trade-marks." (See 2d ed., §§ 521–564.) On this subject see articles by G. D. Custano in 4 Harv. Law Rev. 321 (1891); by Rowland Cox in 5 Id. 139 (1891); by O. R. Mitchell in 10 Id. 275 (1896); also by J. F. Iselin on "The New German Law of Unfair Competition," in 13 Law Quart. Rev. 156 (1897).

[2] See Commonwealth v. Hunt, 4 Metc. (Mass.) 111 (1842); Van Horn v. Van Horn, 56 N. J. Law, 818, 823; s. c., 28 Atl. Rep. 669 (1894); Barr v. Essex Trades Council, 53 N. J. Eq. 101, 116; s. c., 30 Atl. Rep. 881 (1894).

acts, we submit that, within the doctrine above stated, they are entirely lawful.[1] But it will be found as a rule that an act done with intent to injure a trade rival is also done with the intent to benefit oneself; and we shall assume this to be true in the cases hereafter considered. The test that we consider the proper one to apply to every such case (ignoring entirely the existence or non-existence of *intent*), namely, whether the act is *a natural incident or outgrowth of the relation of trade competitor*,[2] may not always be easy to apply

[1] The question as to the effect of such an act was raised by Hannen, J., in Mogul S. S. Co. v. McGregor, note 2, below, but it was regarded as unnecessary to decide it, the intent of the defendants to benefit themselves being clear. See Vegelahn v. Guntner, p. 18, above.

[2] The extent to which such acts may be done is well illustrated in Bowen v. Matheson, 14 Allen (Mass.), 499 (1867), where it was held that no action would lie in favor of a shipping-master to recover damages against persons who formed an association to control the business of the shipping-masters of a city, by requiring the members to conform to certain rules and rates, and to use their best endeavors to prevent their boarders from shipping in any vessel where any of the crew were shipped from boarding-houses not in good standing with the association, and to abstain from shipping men from any office after the association should have suspended business with it, and who, in pursuance thereof, took their men out of ships because the plaintiff's men were in the same, and refused to furnish and ship men to the plaintiff, and prevented men from shipping with him, and notified the public that they had laid him on the shelf (that is, were acting against him as a shipping-master), and notified his customers and friends that he could not ship seamen for them, and prevented his getting seamen to ship, and thus broke up his business. The court say of the actions referred to: "If their effect is to destroy the business of shipping-masters who are not members of the association, it is such a result as in the competition of business often follows from a course of proceeding that the law permits. New inventions and new methods of transacting business often destroy the business of those who adhere to old methods. Sometimes associations break down the business of individuals, and sometimes an individual is able to destroy the business of associated men." Another notable instance is furnished by Mogul S. S. Co. v. McGregor, L. R. App. Cas. (1892), 25, which affirmed 23 L. R. Q. B. D. 598 (1889), which had affirmed 21 Id. 544 (1888); and see prior decision in 15 Id. 476 (1885). The case is remarkable for the number of opinions delivered in its various stages, and has attracted wide attention,

to the complicated facts of a particular case; but it does not seem practicable to lay down a more precise rule. Much must depend on the character of the particular business. What is a natural incident or outgrowth of a wholesale

though, as pointed out elsewhere (see § 19), it is not, as sometimes supposed, an authority as to the validity of contracts restraining competition. The facts are thus stated in the opinion of Lord Watson (p. 41): "The respondents are firms and companies owning steam vessels which ply regularly during the whole year, some of them on the Great River of China between Hankow and Shanghai, and others between Shanghai and European ports. During the tea season, which begins in May and lasts for about six weeks, most shippers prefer to have their tea sent direct from Hankow to Europe; but it suits the respondents' trade better to have the tea which they carry brought down to Shanghai by their ordinary river service, and then transhipped for Europe. Accordingly, they do not send their ocean steamers up the river, except when they find it necessary in order to intercept cargoes which might otherwise have been shipped from Hankow in other than their vessels. The appellants are also a ship-owning company. They do not maintain a regular service either on the Great River or between Europe and Hankow; but they send vessels to Hankow during the tea season, with the legitimate object of sharing in the profits of the tea-carrying trade, which appear, in ordinary circumstances, to have been considerable. The respondents entered into an agreement, the avowed purpose of which was to secure for themselves as much of the tea shipped from Hankow as their vessels could conveniently carry, which was practically the whole of it, and to prevent the appellants and other outsiders from obtaining a share of the trade. The consequence of their acting upon the agreement was that the appellants, having sent their ships to Hankow, were unable to obtain cargoes at remunerative rates; and they claim as damages due to them by the respondents, the difference between their actual annual earnings and the freights which their vessels might have earned had it not been for the combined action of the respondents." Or, as thus stated by Lord Halsbury (p. 35): "An associated body of traders endeavor to get the whole of a limited trade into their own hands by offering exceptional and very favorable terms to customers who will deal exclusively with them; so favorable that, but for the object of keeping the trade to themselves, they would not give such terms; and if their trading were confined to one particular period they would be trading at a loss, but in the belief that by such competition they will prevent rival traders competing with them, and so receive the whole profits of the trade to themselves."

The facts relied on to show that

business operating throughout a country, or even the world, might not be a necessary incident or outgrowth of a retail business confined in its operations to a small country. So, as between the business of transportation by railroad or

the competition was "unfair" are thus stated by Lord Watson (p. 43): "The respondents allowed a discount of five per cent. upon their freight accounts for the year to all customers who shipped no tea to Europe except by their vessels; whenever the appellants sent a ship to load tea at Hankow, the respondents sent one or more of their ocean steamers to underbid her, so that neither vessel could obtain cargo on renumerative terms; and lastly, the respondents took away the agency of their vessels from persons who also acted as shipping agents for the appellants and other trade competitors outside the combination. I cannot for a moment suppose that it is the proper function of English courts of law to fix the lowest prices at which traders can sell or hire, for the purpose of protecting or extending their business, without committing a legal wrong which will subject them in damages. Until that becomes the law of the land, it is, in my opinion, idle to suggest that the legality of mercantile competition ought to be gauged by the amount of the consideration for which a competing trader thinks fit to part with his goods or to accept employment. The withdrawal of agency at first appeared to me to be a matter attended with difficulty; but on consideration I am satisfied that it cannot be regarded as an illegal act. In the first place, it was impossible that any honest man could impartially discharge his duty of finding freights to parties who occupied the hostile position of the appellants and respondents; and in the second place, the respondents gave the agents the option of continuing to act for one or other of them in circumstances which placed the appellants at no disadvantage. It has not been proved, and it has not been suggested, that the respondents used either misrepresentation or compulsion for the purpose of attaining the object of their combination. The only means by which they endeavored to obtain shipments for their vessels, to the exclusion of others, was the inducement of cheaper rates of freight than the appellants were willing to accept." This decision was applied under very similar conditions in Lough v. Outerbridge, 143 N. Y. 271, 283; s. c., 38 N. E. Rep. 292 (1894).

In Continental Ins. Co. v. Board of Fire Underwriters of the Pacific, 67 Fed. Rep. 310 (Cir. Ct. Cal., 1895), there was under consideration "The Board of Fire Underwriters of the Pacific," composed of representatives of certain fire insurance companies, and which had adopted a constitution providing for regulation of premium rates, prevention of rebates, compensation of agents, and non-intercourse with companies not members. A fire insurance

otherwise, and the business of manufacturing. Little has been done as yet, however, to apply the test with reference to the character of the particular business in question.[1]

§ 6. Relation of employer or employee as justifying act injuring another; lockouts; blacklisting.— The frequent controversies between "capital" and "labor" forcibly remind us how fruitful the relation between employer and employee is of opportunities for the commission of acts injuring another. But, notwithstanding all the confusion that has been produced by the introduction of the doctrines allowing effect to "intent" and "combination," we find no obstacle to the application to these relations of the same test as before. The doctrine applied now is that *the existence of the relation to another as employer or employee, justifies acts that are the natural incident or outgrowth of such relation, whether or not done with the direct intent to injure the employee or employer (as the case may be).*[2] Reserving for detailed consideration in the following sections the more numerous

company not a member was not allowed an injunction against the association on the ground that it had unlawfully combined to stifle competition and to prevent the plaintiff from carrying on its business, and that it did prevent it by coercing the plaintiff's agents and customers, and by unjust discrimination. This on the ground that the organization had been formed for trade purposes and not with malice against the plaintiff, there being no evidence of damage to the plaintiff by illegal means. Held, not such damage for the board to dismiss its agent because an agent of the plaintiff, or to put him to an election of service. So of a refusal to place insurance for the plaintiff or its customers. But an injunction was granted against agents of certain of the board companies advertising that they had authority to cancel policies in the plaintiff companies and certain other non-board companies; also against threats by the defendant against certain agents and customers of the plaintiff. See, on the general subject, article by W. H. Tuttle, in 43 Cent. Law Jour. 302 (1896), on "Legitimate Competition."

[1] See further as to what constitutes a trade or business so as to bring it within the rule, § 6.

[2] The courts generally have not as yet advanced to the position that the same test is applicable to the relations of employer and employee as to that of trade competitor. This seems, however, to have been clearly understood by Holmes, J., who, in his dissenting opinion in Vegelahn v. Guntner, 167 Mass. 92, 107; s. c., 44 N. E. Rep.

complications involved in the relation of employee, we here confine ourselves to a consideration of that of employer. Sometimes his relation to the employee is contractual. In

1077 (1896), says: "I have seen the suggestion made that the conflict between employers and employed is not competition. But I venture to assume that none of my brethren would rely on that suggestion. If the policy on which our law is founded is too narrowly expressed in the term 'free competition,' we may substitute 'free struggle for life.' Certainly the policy is not limited to struggles between persons of the same class competing for the same end. It applies to all conflicts of temporal interests." So in Allen v. Flood, L. R. App. Cas. (1898), 1, where the court, admitting, for the sake of argument, that the doctrine is confined to mere "acts which are done in furtherance of trade competition," apply it to inducing the discharge of fellow-employees, saying (p. 141): 'Why is not the present case within it? What was the object of the defendant and the workmen he represented but to assist themselves in their competition with the shipwrights? A man is entitled to take steps to compete to the best advantage in the employment of his labor, and to shut out, if he can, what he regards as unfair competition, just as much as if he was carrying on the business of a shipowner." So it was said by Lord Shand (p. 164): "The case was one of competition in labor, which in my opinion is in all essentials analogous to competition in trade, and to which the same principles must apply." See also p. 167, and dissenting opinion of Caldwell, J., in Hopkins v. Oxley Stave Co., 49 U. S. App. 709, 746; s. c., 83 Fed. Rep. 912, 936 (8th Cir., 1897). On the other hand, in Barr v. Essex Trades Council, 53 N. J. Eq. 101, 124; s. c., 30 Atl. Rep. 881 (1894; for facts see § 12), where an injunction was allowed against a boycott of a newspaper by a number of labor unions, affiliated in a society or representative body known as the "Essex Trades Council" (the members of only one of which had any grievance against the complainant, the action of the others being sympathetic), against the objection that the Council was a business institution, and that what it had done had been in prosecution of its business, the court, after expressly distinguishing Mogul S. S. Co. v. McGregor (see § 5) as a case of competition between parties engaged in the *same character of business*, say: "Neither does the claim of the Essex Trades Council that it is a business institution stand on any firmer ground. The only element of business which it is engaged in, would appear from the facts to be the furnishing to tradesmen of printed cards certifying that they are proper persons for the members of trades unions to deal with, suitable to be displayed in conspicuous places in such tradesmen's places of business. This was supplemented by the issue, under date of March 31, 1894,

such case, in accordance with what we have already seen,[1] he clearly has the right to enforce the contract according to its terms, or to terminate it, without reference to the existence of an intent to injure. His legal justification is that it is so "nominated in the bond." So where his relation is non-contractual, his right to terminate the relation, as by discharging the employee, is not impaired by the existence of such intent.[2] Nor does any different rule seem applicable to the case of a "lockout," which has been defined as "a refusal on the part of an employer to furnish work to his employees in a body, intended as a means of coercion."[3] But,

of the small pocket pamphlet entitled 'The Fair List of Newark, N. J.,' containing the names and addresses of tradesmen and persons in business in Newark, with items of information and advice. Why this is called a business does not appear. It is not stated that any compensation is either required or received by the trades council from the trades people for granting or continuing those indorsements; but whether this is so or not, it is in no sense a competing business with the publication of a daily newspaper."

[1] See § 2, note 8.

[2] Thus, in Heywood v. Tillson, 75 Me. 225, 237 (1883), the refusal of an employer to employ or retain in his service any person renting specified premises, was held to give no right of action to the owner of such premises, though such refusal was through malice or ill-will to such owner. To the contrary, however, is International & G. N. Ry. Co. v. Greenwood, 2 Tex. Civ. App. 76; s. c., 21 S. W. Rep. 559 (1893), where an action was sustained against an employer for discharging employees because of their patronage of the plaintiff. The court say: "The employees presumably had the right to eat and drink where they chose, so long as they violated no contract with their employer, and performed their service well; and the malicious use of such moral coercion upon them by the appellant for the purpose of injuring appellee was wrongful." S. P., Graham v. St. Charles Street R. R. Co., 47 La. Ann. 214; s. c., 16 So. Rep. 806 (1895). But in Payne v. Western & Atlantic R. R. Co., 13 Lea (Tenn.), 507 (1884), such an action was held not to lie, Heywood v. Tillson, above, being followed. It was, however, in International & G. N. Ry. Co. v. Greenwood, above, held otherwise of a *refusal to employ*. The validity of a statute making it unlawful for an employer to prohibit an employee from belonging to a labor union, was denied on constitutional grounds in State v. Julow, 129 Mo. 163; s. c., 31 S. W. Rep. 781 (1895); but to the contrary seems Davis v. State, 30 Weekly L. Bull. 342 (Hamilton Co., Ohio, Com. Pl., 1893).

[3] Century Dictionary.

the relation having once terminated, it is not so clear that the *previously* existing relation will justify such acts done with an intent to injure. Thus, in case of a "blacklist," which has been defined as "a list of persons marked out for special avoidance, antagonism or enmity, on the part of those who prepare the list or those among whom it is intended to circulate," and is said to be "most usually resorted to by combined employers, who exchange lists of their employees who go on strikes, with the agreement that none of them will employ the workmen whose names are on the lists."[1] The general question of the legality of blacklisting seems thus far an unsettled one.[2] If acts of blacklisting are to be sustained on any ground, it would seem to be that they are incidents or outgrowths of "solidarity of interest" among employers, justifying acts analogous to those employed by combinations of tradesmen, to protect themselves against non-paying customers.[3]

§ 7. Legality of combinations to raise wages; trades unions.— On principle, it is not apparent why the legality

[1] Cogley on Strikes and Lockouts, p. 293. This definition was applied in Mattison v. L. S. & M. S. Ry. Co., 3 Ohio Dec. 526 (Lucas Co. Com. Pl., 1895), sustaining an action for blacklisting. But in Jenkinson v. Nield, 8 Times L. R. 540 (1892), blacklisting an employee was held not actionable, it not appearing that "the defendants were actuated by any other motive than self-interest." This on the ground that such action was within the limits of fair competition. See also, as to liability for blacklisting, Bradley v. Pierson, 148 Pa. St. 502; S. C., 24 Atl. Rep. 65 (1892). Compare as to duty imposed on railroad company by custom to give discharged employee a "clearance card," to enable him to obtain employment elsewhere, Cleveland, C., C. & St. Louis Ry. Co. v. Jenkins, 70 Ill. App. 415 (1897). In Blumenthal v. Shaw, 89 U. S. App. 490; S. C., 77 Fed. Rep. 954 (3d Cir., 1897), was sustained an action against a former employer for preventing the plaintiff from obtaining employment elsewhere, and causing his dismissal from places where he had procured work. This was done by merely requesting that he be not employed, such requests being complied with in pursuance of an understanding among a number of such employers not to employ an apprentice belonging to another.

[2] See note 1, above. But in several States it is made unlawful by statute. See Appendix. See as to injunction against blacklisting, § 16.

[3] See § 9.

of combinations among employees as such, should be subjected to any different test from that applied to combinations among employers as such, or among tradesmen as such. Combinations among those having a common interest are numerous and cover an infinite variety of purposes; witness, churches, clubs, lodges and other organizations for religious, social and business purposes. As a rule, the legality of such combinations, when unincorporated, is conceded on common-law principles, and at present much encouragement is furnished by statutes for their formation as corporations. But as to combinations among wageworkers, particularly for the purpose of obtaining an increase of wages, there has been sometimes announced the anomalous doctrine that such combinations are illegal as criminal conspiracies. The origin of this supposed doctrine appears on a consideration of the social conditions that had prevailed in England for centuries, producing a series of statutes dating as far back as the fourteenth century, operating most oppressively upon the laboring classes.[1]

[1] The doctrine has been thought to find support in such decisions as King v. Journeymen Tailors of Cambridge, 8 Modern, 10 (1721); King v. Mawbey, 6 T. R. 619, 636 (1796). The sentiment among the ruling classes who until recently controlled the courts as well as Parliament, is strikingly reflected in that remarkable and much misunderstood decision, Hilton v. Eckersley, 6 El. & Bl. 47 (1855), where a combination among a number of mill owners, designed to secure unity of management, was held illegal, though the element of tendency to suppress competition did not enter into the case. It seems difficult to sustain the decision on any accepted principle of law, as the objections urged against the combination seem equally applicable to an ordinary corporation or partnership. The real motive for the decision was the fear that, by an application of the homely maxim that "what is sauce for the goose is sauce for the gander," a decision sustaining the legality of the agreement would have been by analogy used to sustain the legality of combinations among workmen. Thus, it was said by Alderson, J., on appeal (p. 76): "If a bond of this sort *between masters* is capable of being enforced at law, an agreement to the same effect *amongst workmen* must be equally legal and enforceable; and so we shall be giving a legal effect to *combinations of workmen for the purpose of raising wages*, and make their strikes capable of being enforced at law." And so the agreement was held unlawful, even on the supposition that the object,

But this doctrine never gained foothold in this country, where it has been generally repudiated, and it may be regarded as established here, as a common-law principle, that a combination among wageworkers for the purpose of obtaining an increase of wages or for any other lawful purpose is entirely lawful,[1] the only question of legality being as to

viz., to protect against combinations of workmen, was lawful. As a logical result, this decision was followed in Hornby v. Close, 2 L. R. Q. B. 153 (1867), holding such combinations of workmen to be illegal. But the advance in public opinion is shown by the decision of the same court two years later, its constitution having been changed in the meantime, the court being now *equally divided* on the question of the legality of such combinations. Farrer v. Close, 4 L. R. Q. B. 602 (1869). But as a result of recent elaborate investigation, it must be considered as settled that the doctrine that a combination among workmen for the purpose of obtaining an increase of wages, never existed in England, independently of statute. See Wright on Criminal Conspiracies and Agreements, p. 44; Stephen's History of the Criminal Law of England, vol. 3, pp. 202–227; Master Stevedores' Assoc. v. Walsh, 2 Daly, 1 (1867). Moreover, in England the question is at rest since the enactment in 1875 of the "Conspiracy and Protection of Property Act," providing that "an agreement or combination by two or more persons to do or procure to be done any act in contemplation or furtherance of a trade dispute between employers and workmen, shall not be indictable as a conspiracy if such act committed by one person would not be punishable as a crime." See English statutes and decisions reviewed in an article by Clifford Brigham in 21 Am. Law Rev. 41 (1887).

[1] Following King v. Journeymen Tailors of Cambridge, 8 Modern, 10 (1721); King v. Mawbey, 6 T. R. 619, 636 (1796), such a combination was held illegal in People v. Fisher, 14 Wend. (N. Y.) 1 (1835), which was, however, decided under the New York statute making it a misdemeanor to conspire to "*commit any act injurious to trade or commerce.*" But People v. Fisher is not law in New York since the enactment of Penal Code, § 170. Johnston Harvester Co. v. Meinhardt, 60 How. Pr. (N. Y.) 168 (Supm. Ct., Sp. T., 1880). See observations upon People v. Fisher in Commonwealth v. Hunt, 4 Metc. (Mass.) 111, 135 (1842); Master Stevedores' Assoc. v. Walsh, 2 Daly, 1, 4 (1867). But the American authorities generally are to the effect as stated in the text. Thus, Master Stevedores' Assoc. v. Walsh, above, where the authorities are very critically examined, in a decision sustaining a by-law of an association of master stevedores providing for fixing prices for which members should work. Here the question was simply between the

the means employed. To such a combination may be applied the general term *trade union*, which has been defined as "a combination of workmen of the same trade or of several allied trades for the purpose of securing, by united action, the most favorable conditions as regards wages, hours of labor, etc., for its members."[1] As in the case of an indi-

association and its members, in an action to enforce a penalty for violating the by-law. In view of the recent agitation against contracts in restraint upon competition, it seems almost strange that the court did not consider the case from the standpoint from which a court would nowadays certainly consider it, namely, whether the by-law was not void as tending to destroy competition. Other authorities holding or declaring that combinations to raise wages are not illegal are Moores v. Bricklayers' Union, 7 Ry. & Corp. L. J. 108 (Super. Ct. Cinn., 1889); Queen Ins. Co. v. State, 86 Tex. 250, 272; s. c., 24 S. W. Rep. 397 (1893); Longshore Printing Co. v. Howell, 26 Oreg. 527; s. c., 38 Pac. Rep. 547 (1894; sustaining a by-law limiting the number of apprentices to be employed in a newspaper office); Thomas v. Cincinnati, N. O. & T. P. Ry. Co., 62 Fed. Rep. 803, 817 (Cir. Ct. Ohio, 1894); United States v. Cassidy, 67 Id. 698, 711 (D. Ct. Cal., 1895); Clemmitt v. Watson, 14 Ind. App. 38; s. c., 42 N. E. Rep. 367 (1895); Snow v. Wheeler, 113 Mass. 179 (1873; sustaining association of workmen formed to protect themselves from "encroachments" from their employers, and agreeing not to teach others their trade without the permission of the association). See also Commonwealth v. Carlisle, Brightly (Pa.), 36 (1821). In some States the validity of such combinations has, as in England (see above), been expressly declared by statute. See Appendix. See as to effect of Pennsylvania statutes, Commonwealth v. Sheriff, 15 Phila. 393 (1881). See also Cote v. Murphy, 159 Pa. St. 420; s. c., 28 Atl. Rep. 190 (1894; see as to whether such statutes are unconstitutional as class legislation). See, as to New York Penal Code, § 170, Johnston Harvester Co. v. Meinhardt, 60 How. Pr. (N. Y.) 168 (Supm. Ct., Sp. T., 1880; refusing injunction against a combination to entice from employment); People ex rel. Gill v. Smith, 5 N. Y. Crim. R. 509 (N. Y. Co. Oyer & Terminer, 1887; held not to legalize combination to compel discharge of employee, no question as to the *rate of wages* being involved); People v. Barondess, 133 N. Y. 649; s. c., 31 N. E. Rep. 240 (1892; dissenting opinion of Gray, J., in 45 N. Y. State Rep. 248), reversing 61 Hun, 571, 581; s. c., 16 N. Y. Suppl. 436 (1891); Curran v. Galen, 152 N. Y. 33; s. c., 46 N. E. Rep. 297 (1897); People v. Wilzig, 4 N. Y. Crim. R. 403 (N. Y. Co. Oyer & Terminer, 1886); People v. Kostka, Id. 429 (N. Y. Co. Oyer & Terminer, 1886); Rogers v. Evarts, 17 N. Y. Suppl. 264 (Supm. Ct., Sp. T., 1891).

[1] Century Dictionary. The incorporation of trades unions is some-

vidual employee, to such a combination of employees is doubtless applicable the general doctrine already stated. As applied, it is that *the existence of the relation of employee justifies acts by a combination of employees that are the natural incident or outgrowth of such relation, whether or not done with direct intent to injure.* It seems clear that the same general limitations apply to this relation as to the relation of trade competitor, excluding acts of fraud and violence as means of attaining the purposes of the union. But the application of this doctrine to special classes of cases, such as strikes and boycotts, will be hereafter considered. Thus, as to methods adopted for the purpose of increasing or retaining membership or enforcing regulations of the union.[1] We exclude here from consideration, as only

times provided for by statute. As to Maryland statute see Lucke v. Clothing Cutters', etc. Assembly, 77 Md. 396; s. c., 26 Atl. Rep. 505 (1893); as to act of congress (24 U. S. Stat. at Large) authorizing incorporation of national trades unions, Arthur v. Oakes, 24 U. S. App. 239, 262; s. c., 63 Fed. Rep. 310, 324 (7th Cir., 1894).

[1] Curran v. Galen, 152 N. Y. 33; s. c., 46 N. E. Rep. 297 (1897). Here the court say: "The social principle which justifies such organizations is departed from when they are so extended in their operation as either to intend or to accomplish injury to others. Public policy and the interests of society favor the utmost freedom in the citizen to pursue his lawful trade or calling, and if the purpose of an organization or combination of workingmen be to hamper or to restrict that freedom, and, through contracts or arrangements with employers, to coerce other workingmen to become members of the organization, and to come under its rules and conditions, under the penalty of the loss of their position and of deprivation of employment, then that purpose seems clearly unlawful and militates against the spirit of our government and the nature of our institutions." The court approve of the following language used in Queen v. Rowlands, 17 Q. B. 671, 686 (1851), with reference to combinations of workingmen: "A combination for the purpose of injuring another is a combination of a different nature, directed personally against the party to be injured; and the law allowing them to combine for the purpose of obtaining a lawful benefit to themselves, gives no sanction to combinations which have for their immediate purpose the hurt of another." In accordance with the view we have already advanced, we consider this statement open to criticism as making the "purpose" or *intent*

tending to confuse our present discussion, an element that has to but a slight extent figured in the controversy, namely, the tendency of such combinations to destroy competition. This we shall consider hereafter in connection with combinations to increase prices.[1]

§ 8. Legality of combinations to quit employment; strikes.— The right of a single individual, apart from contractual relations,[2] to quit his employment, that is, to discontinue working for a particular employer, seems never to have been seriously questioned.[3] The idea has been advanced

the test of liability, instead of whether the act was the natural incident or outgrowth of the relation in which the party stood. The force of this criticism will be more apparent upon a consideration of the facts of the case. See discussion thereof, § 15. In Longshore Printing Co. v. Howell, 26 Oreg. 527, 540; s. c., 38 Pac. Rep. 547 (1894), are thus stated the limitations upon the activities of such organizations: "These associations must depend for their membership upon the free and untrammeled choice of each individual member. No resort can be had to compulsory methods of any kind, either to increase, keep up or retain such membership. Nor is it permissible for associations of this kind to enforce the observance of their laws, rules and regulations through violence, threats or intimidation, or to employ any methods that would induce intimidation or deprive persons of perfect freedom of action. Such organizations may be preserved and their membership augmented by reasoning and fair arguments, and even by persuasion and entreaty, and an observance of their adopted constitutions and by-laws may be exacted through the same peaceful means, but beyond this it is not advisable, from a legal standpoint, to venture." See also United States v. Cassidy, 67 Fed. Rep. 698, 711 (D. Ct. Cal., 1895).

[1] See § 27.

[2] See Commonwealth v. Hunt, 4 Metc. (Mass.) 111, 130 (1842). In Arthur v. Oakes, 24 U. S. App. 239, 252; s. c., 63 Fed. Rep. 310, 317 (7th Cir., 1894), it is intimated that, in case of a breach by an employee of his contract of employment, he might be liable, "in some states of case, to criminal prosecution for loss of life or limb by passengers or others, directly resulting from his abandoning his post at a time when care and watchfulness were required upon his part in the discharge of a duty he had undertaken to perform." Such liability has, indeed, in some cases been declared by statute. See Appendix.

[3] See Barr v. Essex Trades Council, 53 N. J. Eq. 101, 114; s. c., 30 Atl. Rep. 881 (1894); Clemmitt v. Watson, 14 Ind. App. 38; s. c., 42 N. E. Rep. 367 (1895).

that the nature of the employment may create an implied agreement not to quit, at least, without reasonable notice,[1] but this exception to the general doctrine remains to become generally established. It has been seriously questioned whether this right to quit one's employment equally exists in case of a *combination* to so quit employment or discontinue working. In other words, the question is whether *strikes* are legal, for we define a *strike* as *a simultaneous quitting of employment by a number of employees in pursuance of agreement.*[2] Apart from the lurking idea already

[1] This doctrine was applied in Toledo, Ann Arbor, etc. Ry. Co. v. Pennsylvania Co., 54 Fed. Rep. 746, 752 (Cir. Ct. Ohio, 1893), where it was said of railroad employees (in this particular case, a locomotive engineer), after referring to their presumed knowledge of the duty of their employers, both under the Interstate Commerce Law and an order of the court, to receive and haul interstate freight: "An implied obligation was therefore assumed by the employees, upon accepting service under such conditions, that they would perform their duties in such manner as to enable it not only to discharge its obligations faithfully, but also to protect it against irreparable losses and injuries and excessive damages by any acts of omission on their part. One of these implied conditions on their behalf was that they would not leave its service or refuse to perform their duties under circumstances when such neglect on their part would imperil lives committed to their care, or the destruction of property involving irreparable loss and injury, or visit upon it severe penalties. In ordinary conditions, as between employer and employee, the privilege of the latter to quit the former's service at his option cannot be prevented by restraint or force. The remedy for breach of contract may follow to the employer, but the employee has it in his power to arbitrarily terminate the relations and abide the consequences. But these relative rights and powers may become quite different in the case of the employees of a great public corporation charged by the law with certain great trusts and duties to the public." See, as to violation of injunction, § 16. See also Arthur v. Oakes, 24 U. S. App. 289, 254; s. c., 63 Fed. Rep. 310, 318 (7th Cir., 1894).

[2] The following definitions of a strike have been given: "A concerted or general quitting of work by a body of men or women for the purpose of coercing their employer in some way, as when higher wages or shorter hours are demanded, or a reduction of wages is resisted; a general refusal to work as a coercive measure." Century Dictionary. "The act of combining and demanding higher wages for

considered,[1] that an act entirely lawful if done by a single individual may be unlawful by reason of being done in pur-

work; cessation from labor or neglect of duty in a spirit of mutiny or revolt." Webster. "A cessation from work, as of workmen, in order to extort higher wages; — a revolt; a mutiny." Worcester. "A combination among laborers, those employed by others, to compel an increase of wages, a change in the hours of labor, some change in the mode and manner of conducting the business of the principal, or to enforce some particular policy in the character or number of the men employed, or the like." Delaware, L. & W. R. R. Co. v. Bowns, 58 N. Y. 573, 582 (1874). (This definition was substantially adopted in Anderson's Law Dictionary.) "The act of a body of workmen employed by the same master, in stopping work all together at a pre-arranged time, and refusing to continue until higher wages or shorter time, or some other concession, is granted to them by the employer." Black's Law Dictionary. We consider all these definitions open to criticism, as including *intent* in the conception of a strike. More nearly resembling the definition given in the text is that of Kay, J., in Lyons v. Wilkins, 1 L. R. Ch. (1896), 811, 829, "an agreement between persons who are working for a particular employer not to continue working for him." In Farrer v. Close, 4 L. R. Q. B. 602, 612 (1869), the definition given by Hannen, J., is "a simultaneous cessation of work on the part of the workmen." The notion expressed in Farmers' Loan & Trust Co. v. Northern Pacific R. R. Co., 60 Fed. Rep. 803, 819 (Cir. Ct. Wis., 1894), that *compulsion and force* are essential elements of the definition of a strike, deserves severe condemnation. See modification of this decision in Arthur v. Oakes, 24 U. S. App. 239, 267; s. c., 63 Fed. Rep. 310, 327 (7th Cir., 1894), holding that an order in broad terms restraining *strikes* by employees of a railroad operated by receivers should be limited to "those designed to physically cripple the trust property, or to actually obstruct the receivers in the operation of the road, or to interfere with their employees who do not wish to quit, or to prevent by intimidation or other wrongful modes, or by any device, the employment of others to take the places of those quitting, and not such as were the result of the exercise by employees, in peaceable ways, of rights clearly belonging to them, and which were not designed to embarrass or injure others, or to interfere with the actual possession and management of the property by the receivers." See, on the general subject, article in 27 Am. Law Rev. 708 (1893), by U. M. Rose, on "Strikes and Trusts;" in 17 Crim. Law Mag. 1 (1895), by J. Z. Erwin, on "Are Strikes Preventable by Judicial Action?" As to effect of strike in excusing failure of a carrier to deliver, see textbooks on the general subject of carriers.

[1] See § 4.

suance of a combination of individuals to do the same act, it is difficult, on principle, to discover any illegality in a strike, as we have just defined it, and this is the view that has been generally adopted in this country.[1] In England,

[1] Commonwealth v. Hunt, 4 Metc. (Mass.) 111, 130 (1842); Carew v. Rutherford, 106 Mass. 1, 14 (1870); Barr v. Essex Trades Council, 53 N. J. Eq. 101, 114; s. c., 30 Atl. Rep. 881 (1894); Longshore Printing Co. v. Howell, 26 Oreg. 527, 543; s. c., 38 Pac. Rep. 547 (1894); Clemmitt v. Watson, 14 Ind. App. 38; s. c., 42 N. E. Rep. 367 (1895); Toledo, Ann Arbor, etc. Ry. Co. v. Pennsylvania Co., 54 Fed. Rep. 730, 737 (Cir. Ct. Ohio, 1893); Arthur v. Oakes, 24 U. S. App. 239, 253; s. c., 63 Fed. Rep. 310, 318 (7th Cir., 1894), modifying Farmers' Loan & Trust Co. v. Northern Pacific R. R. Co., 60 Fed. Rep. 803 (Cir. Ct. Wis., 1894); United States v. Elliott, 64 Fed. Rep. 27, 32 (Cir. Ct. Mo., 1894); Hopkins v. Oxley Stave Co., 49 U. S. App. 709, 717; s. c., 83 Fed. Rep. 912, 917 (8th Cir., 1897). Alone to the contrary among recent decisions seems Mapstrick v. Ramge, 9 Neb. 390; s. c., 2 N. W. Rep. 739 (1879), but it is clear that the court did not consider the point. See § 4. In Arthur v. Oakes this doctrine was declared with great emphasis. There an injunction against employees of the receiver of a railroad restraining them from "so quitting the service of the said receivers, with or without notice, as to cripple the property, or to prevent or hinder the operation of said railroad," was refused, on the general ground that a court of equity will not by injunction prevent one individual from quitting the personal service of another. And this was held applicable though the employees were those of a railroad. The court say: "Undoubtedly the simultaneous cessation of work by any considerable number of the employees of a railroad corporation, without previous notice, will have an injurious effect, and for a time inconvenience the public. But these evils, great as they are, and although arising in many cases from the inconsiderate conduct of employees and employers, both equally indifferent to the general welfare, are to be met and remedied by legislation restraining alike employees and employers, so far as necessary adequately to guard the rights of the public as involved in the existence, maintenance and safe management of public highways. In the absence of legislation to the contrary, the right of one in the service of a quasi-public corporation to withdraw therefrom at such time as he sees fit, and the right of the managers of such a corporation to discharge an employee from service whenever they see fit, must be deemed so far absolute that no court of equity will compel him against his will to remain in such service, or actually to perform the personal acts required in such employments, or compel such managers against their will to keep a particular employee in their service." Nor is

however, as a logical application of the doctrine there announced, that combinations among workmen are illegal as criminal conspiracies, the result was judicially reached that strikes are illegal,[1] though perhaps without a very clear idea of the distinction between strikes that are, and those that are not, accompanied with unlawful methods. It will be noted that the conception of a strike, that is, a mere quitting of employment, in no sense covers acts performed by the employees *after they have quitted the employment*.[2] Nor, in the view that we have taken, does it in any sense involve the *intent* with which they quit the employment. It is obvious

the right affected by Re Debs, 158 U. S. 564, 598; s. c., 15 Supm. Ct. Rep. 900 (1895), notwithstanding what may have been said in the decision in 64 Fed. Rep. 724, 763 (Cir. Ct. Ill., 1894), here affirmed. See previous decision in 63 Fed. Rep. 486 (Cir. Ct. Ill., 1894). This decision (*i. e.*, in 158 U. S. 564) has only an indirect bearing upon the subject of labor combinations. The relief granted was simply against interference with interstate commerce, and it is expressly stated that the object of the bill was not "to restrain the defendants from abandoning whatever employment they were engaged in;" that "the right of any laborer or any number of laborers to quit work was not challenged." See as to effect of Federal Anti-trust Law, § 21. This overrules what was said in Waterhouse v. Comer, 55 Fed. Rep. 149, 157 (Cir. Ct. Ga., 1893), that in view of the Interstate Commerce Act and United States Revised Statutes, section 5440, "a strike or 'boycott,' as it is popularly called, if it was ever effective, can be so no longer." See also Farmers' Loan & Trust Co. v. Northern Pacific R. R. Co., 60 Fed. Rep. 803, 823 (Cir. Ct. Wis., 1894). The right to strike has in some cases been expressly declared by statute. See Appendix. It scarcely needs adding that the announcement to the employer of the intention to quit is lawful. See Longshore Printing Co. v. Howell, 26 Oreg. 527, 543; s. c., 38 Pac. Rep. 547 (1894).

[1] Hornby v. Close, 2 L. R. Q. B. 153 (1867). See § 7, p. 28. But since the enactment in 1875 of the "Conspiracy and Protection of Property Act" (see also § 14) strikes have been regarded as legal in England. See Gibson v. Lawson, 2 L. R. Q. B. (1891), 557; Temperton v. Russell, 1 L. R. Q. B. (1893), 715; Lyons v. Wilkins, 1 L. R. Ch. (1896), 811, 829. In Perrault v. Gauthier, 28 Canada Supm. Ct. 241 (1898), it was held that no action would lie for a strike instituted by the fellow-employees of the plaintiff because of his membership in a rival organization, which resulted in his quitting employment to avoid causing loss to his employers.

[2] See § 14.

that the motives for so quitting may be various. There may be physical infirmity producing incapacity, the prospect of higher wages or more congenial surroundings in another place or line of employment, and so on. In such cases there is not necessarily involved any intent to inflict injury upon another person, save as an intent may be inferred to produce injury to the employer, by the inconvenience produced by the withdrawal of an employee or a number of employees. And in such cases there is ordinarily involved no question of the legality of the quitting. But a combination to quit employment very often involves a definite intent to inflict injury. Applying, however, what has already been said, we may say here that (apart from the existence of contractual liability) *the existence of the relation of employee justifies, as a natural incident or outgrowth of such relation, the quitting of employment, whether singly or in a combination, and whether or not with the intent to injure the employer (or any other person).*[1] This statement of the doctrine covers what have been termed *sympathetic* strikes, the only differ-

[1] Thus, where the intent is to inflict injury upon the employer to induce him to grant concessions, or in turn to injure a fellow-employee by refusing to continue to deal with him, that is to discharge him. So where the intent was to enforce a rule as to the number of apprentices to be employed by the employer. Longshore Printing Co. v. Howell, 26 Oreg. 527; s. c., 38 Pac. Rep. 547 (1894). See § 10. In Arthur v. Oakes, 24 U. S. App. 239, 255; s. c., 63 Fed. Rep. 310, 319 (7th Cir., 1894), it is said: "The fact that employees of railroads may quit under circumstances that would show bad faith upon their part, or a reckless disregard of their contract or of the convenience and interests of both employer and the public, does not justify a departure from the general rule that equity will not compel the actual affirmative performance of merely personal services, or (which is the same thing) require employees, against their will, to remain in the personal service of their employer." But in Toledo, Ann Arbor, etc. Ry. Co. v. Pennsylvania Co., 54 Fed. Rep. 730 (Cir. Ct. Ohio, 1893), an injunction was granted against the chief executive of an association of railroad employees (the Brotherhood of Locomotive Engineers) to restrain him from enforcing any rule requiring the employees of certain companies to refuse to handle and deliver freight transported by or to a certain company,

ence between these and ordinary strikes being that, in case of the former, the object is not necessarily to influence the action of the employer of the striking employees, but that of some other employer with some purpose of whose employees the striking employees are in sympathy; as, for instance, where strikes are inaugurated on a number of lines of railroad for the purpose of influencing the proprietors of only *one* of these lines to grant an increase of wages.

and from inducing them to refuse to extend to such company facilities for exchange of traffic. This was simply the case of the refusal of employees to do their work. It does not appear that they were under contract. But the court sought to justify the injunction on the ground that the *intent* of the employees was to induce their respective companies to refuse to deal with such other company, with the ultimate purpose of inducing the latter to discharge certain employees (engineers not members of the Brotherhood). We have elsewhere fully considered the propriety of considering *intent*, in determining whether a right of action arises from an action producing injury. See § 2. In the case cited, the doctrine that it is to be considered was very broadly applied. The court say in reply to the claim that an employee has the right to quit his employment, apart from contractual liability (p. 737): "Generally speaking, this is true, but not absolutely. If he uses the benefit which his labor is or will be to another by threatening to withhold it or agreeing to bestow it, or by actually withholding it or bestowing it, *for the purpose of* inducing, procuring or compelling that other to commit an unlawful or criminal act, the withholding or bestowing of his labor for such a purpose is itself an unlawful and criminal act." The decision was based not solely on the ordinary rules applicable to boycotts, but on the additional ground that the refusal to handle freight (being interstate freight) was in direct violation of the Interstate Commerce Law; hence the reference to inducing another "to commit an unlawful or criminal act." We elsewhere consider the legality of the acts intended, as distinct from the mere act of refusing to work. See § 12. So in Thomas v. Cincinnati, N. O. & T. P. Ry. Co., 62 Fed. Rep. 803, 818 (Cir. Ct. Ohio, 1894; for facts see § 12), it was said of a boycott: "All the employees had the right to quit their employment, but they had no right to combine to quit in order thereby to compel their employer to withdraw from a mutually profitable relation with a third person for the purpose of injuring that third person, when the relation thus sought to be broken had no effect whatever on the character or reward of their service."

§ 9. Liability for inducing refusal to deal; boycotts.— No authority is needed to sustain the proposition that there is nothing inherently or necessarily illegal, either in refusing to deal or continue to deal, or in inducing a person to refuse to deal or continue to deal, with another. Thus there can, especially in case of response to a request for advice, be nothing *inherently or necessarily* illegal in inducing a person not to patronize this or that doctor or grocer. Such inducement or advice is a part of the very web and woof of ordinary neighborly and social intercourse.[1] In a sense, injury is done by such act of inducement, in causing a loss of patronage. It seems at least doubtful, on principle, whether such injury is not too remote and contingent for the law to take into consideration.[2] But supposing such injury to be done,

[1] See observations of Lords Herschell and James, in Allen v. Flood, L. R. App. Cas. (1898), 1, 126, 179. In Ulery v. Chicago Live-stock Exchange, 54 Ill. App. 233 (1894), the action of a live-stock exchange in requesting its members not "to employ the plaintiff in the live-stock commission business, or to transact any business with him at the Union Stock Yards," was held not unlawful, the court saying: "A person, with or without reason, may refuse to trade with another; so may ten or fifty persons refuse. An individual may advise his neighbor or friend not to trade with another neighbor; he may even command, when the command amounts only to earnest advice." It would seem scarcely necessary to argue that there is nothing inherently unlawful in merely *refusing to deal* with a person; but see People v. Duke, 19 Misc. (N. Y.) 292, 298 (N. Y. Co. General Sessions, 1897). In Woodward v. Boston, 33 Am. Law Rev. 624 (Super. Ct. Mass., 1898), the discontinuance by the mayor of a city of work under a public contract was held not justified on the ground of non-compliance with a provision in the contract that the contractors should give preference in employment to "members of the several trades unions." Such provision was held void, as an unlawful discrimination between workmen. But if the contractors had the right to refuse to deal with, *i. e.*, refuse to employ, non-union workmen, why could they not bind themselves to so refuse to deal?

[2] See § 13; Hughes v. McDonough, 43 N. J. Law, 459 (1881). In McDonald v. Edwards, 20 Misc. 523; s. c., 46 N. Y. Suppl. 672 (Supm. Ct., Sp. T., 1897), where the alleged injury consisted in making statements to a guaranty company by reason of which it refused to give a bond for the plaintiff's good con-

and intentionally done, we may (ignoring the existence of the intent) still apply the test already stated, namely, *whether the act was the natural incident or outgrowth of some existing lawful relation.* We might perhaps content ourselves with asserting the general relation as a member of society, justifying such act as a natural incident or outgrowth of ordinary neighborly or social intercourse.[1] But this general relation is commonly reinforced by a more special relation,[2] like that of trade competitor or employer or

duct to a party with whom the plaintiff was negotiating for employment, whereupon such party refused to employ the plaintiff, no action was held to lie, the act complained of not being the proximate cause of the injury. The court say: "Between the wrong of the defendant and the damage to the plaintiff, the voluntary act of a third party intervened; and that act was the proximate cause of plaintiff's loss of employment." Moreover, the defendant did not volunteer his opinion of the plaintiff to the company, which had been referred to the defendant by the plaintiff to furnish information as to his habits and character.

[1] This view seems fully sustained by Boyson v. Thorn, 98 Cal. 578; s. c., 33 Pac. Rep. 492 (1893), (see § 13), which, although a case of inducement to break a contract, seems *a fortiori* applicable to the case of inducement not to deal. It must be admitted, however, that the authorities generally have not as yet gone to that extent. Thus, it was broadly stated by Lopes, J., in Temperton v. Russell, 1 L. R. Q. B. (1893), 715, 731: "The result of the authorities appears to me to be that a combination by two or more persons *to induce others not to deal* with a particular individual, or enter into contracts with him, if done with the intention of injuring him, is an actionable wrong, if damage results to him therefrom." In harmony with this view is Delz v. Winfree, 80 Tex. 400; s. c., 16 S. W. Rep. 111 (1891), holding it actionable for a combination of cattle dealers to induce others not to sell to a butcher, it appearing that their interference with his business was not to serve any legitimate purpose of their own, but was wanton and malicious, causing pecuniary loss to him, as they intended. Here the relation of the defendants does not appear; but compare subsequent decision. (See note 2, below.)

[2] Thus, the interest common to a body of tradesmen to protect themselves against dishonest debtors. On this ground have been sustained agreements among the members of such a body not to deal with a person indebted to any one of their number. Delz v. Winfree, 6 Tex. Civ. App. 11; s. c., 25 S. W. Rep. 50 (1894; see former decision, note 1, above); Brewster v. Miller, — Ky. — s. c., 41 S. W. Rep. 301 (1897). To similar effect, Schulten v. Ba-

employee. The question of legality has more commonly arisen in case of the acts of combinations of individuals than of mere individuals.[1] But as, according to authorities already considered,[2] the act is not made illegal by the intent to injure, so according to others[3] it is not made illegal by

varian Brewing Co., 96 Ky. 224; s. c., 28 S. W. Rep. 504 (1894). In the case last cited, however, it was intimated that, *if the plaintiff had not been indebted*, the action of the combination would have been unlawful. But in Park v. National Wholesale Druggists' Assoc., 50 N. Y. Suppl. 1064 (Supm. Ct., Sp. T., 1896), an injunction was allowed against a combination of wholesale druggists and manufacturers of proprietary medicines, to prevent a customer of one from obtaining goods from the rest, because of violation by such customer of an agreement as to prices of goods to be sold by the latter. Compare further decision in 30 N. Y. App. Div. 508; s. c., 52 N. Y. Suppl. 475 (1898); also Park v. Hubbard, 30 N. Y. App. Div. 517; s. c., 52 N. Y. Suppl. 481 (1898). Somewhat analogous is the case of the interest common to a body of employers in a contest with employees. Thus, in Cote v. Murphy, 159 Pa. St. 420, 430; s. c., 28 Atl. Rep. 190 (1894), an action by a dealer in building materials was held not to lie against an association of persons engaged in the business of contracting and building, for inducing dealers in building materials not to sell to the plaintiff. The ground of this action of the association was that the plaintiff had conceded the demands of workmen engaged in a general strike in the building trades. The court, considering it necessary to show the legality of the relation, after drawing a distinction between the rate of wages as fixed by the law of supply and demand in the absence of combination, and the rate as fixed by a combination of workmen, justified the defendants' acts on the ground thus stated: "The combination of the employers was not to interfere with the price of labor as determined by the common-law theory, but to defend themselves against a demand made altogether regardless of the price as regulated by the supply." To similar effect is Buchanan v. Kerr, 159 Pa. St. 433; s. c., 28 Atl. Rep. 195 (1894).

[1] Though, as is well said by E. P. Cheyney, in 4 Pol. Sci. Quart. 274 (1889), "a boycott might be initiated as well by a single person as by a combination."

[2] See § 2. In Hopkins v. Oxley Stave Co., 49 U. S. App. 709, 722; s. c., 83 Fed. Rep. 912, 921 (8th Cir., 1897. See § 15), a case of a threatened boycott by employees, the court called attention to the fact that one object was "to deprive the public at large of the benefits to be derived from a labor-saving machine, which seems to have been one of great utility."

[3] See § 4.

reason of being the act of a combination of individuals.[1] We have now reached the conception of a *boycott*, which we may define as *the act of a combination of persons in refusing to deal or in inducing others not to deal with a third person.*[2] As in case of the definition of a strike,[3] we exclude from the

[1] Even in Toledo, Ann Arbor, etc. Ry. Co. v. Pennsylvania Co., 54 Fed. Rep. 730 (Cir. Ct. Ohio, 1893), a conspicuous illustration of the application of the doctrine that an act entirely lawful, if done by a single individual, may be unlawful by reason of being done in pursuance of a combination of individuals to do the same thing (see § 4), it seems to be held that there is nothing unlawful in the mere combination, apart from the question of intent. Thus, it is said (p. 738): "Ordinarily, when such a combination of persons does not use violence, actual or threatened, to accomplish their purpose, it is difficult to point out with clearness the illegal means or end which makes the combination an unlawful conspiracy; for it is generally lawful for the combiners to withdraw their intercourse and its benefits from any person, and to announce their intention of doing so, and it is equally lawful for the others, of their own motion, to do that which the combiners seek to compel them to do. Such combinations are said to be unlawful conspiracies, though the acts in themselves and considered singly are innocent, *when the acts are done with malice;* i. e., *with the intention to injure another without lawful excuse.*" This language was applied in Barr v. Essex Trades Council, 53 N. J. Eq. 101, 116; s. c., 30 Atl. Rep. 881 (1894). Another conspicuous illustration of the doctrine allowing effect to combination as an element (both decisions being by the same judge) is Thomas v. Cincinnati, N. O. & T. P. Ry. Co., 62 Fed. Rep. 803, 821 (Cir. Ct. Ohio, 1894), where a boycott of the Pullman Palace Car Company by railroad employees was declared illegal, not merely under the general law of boycotts, but on account of the gigantic character of a combination relating to what was "necessary to life and health and comfort of the people of this country," the court saying (p. 807): "As the lodges of the American Railway Union extended from the Allegheny Mountains to the Pacific coast, it will be seen that it was contemplated by those engaged in carrying out this plan that, in case of a refusal of the railway companies to join the union in its attack upon the Pullman Company, there should be a paralysis of all railway traffic of every kind throughout that vast territory traversed by lines using Pullman cars."

[2] The word "boycott" is of very recent origin, dating back only to about 1880. Century Dictionary. For an account of its origin, see Mr. Justin McCarthy's "England under Gladstone," and quotation therefrom in State v. Glidden, 55 Conn. 46, 76; s. c., 8 Atl. Rep. 890

[3] See § 8.

definition the idea of intent to injure; so too the idea of coercion, though the view has been sometimes expressed

(1887). In Moores v. Bricklayers' Union, 7 Ry. & Corp. L. J. 108 (Super. Ct. Cinn., 1889), reference is made to the oldest recorded case of boycotting as occurring in 1221, citing "vol. 1 of the publication of the Selden Society, p. 115, case 178, Pleas of the Crown." In Consolidated Steel & Wire Co. v. Murray, 80 Fed. Rep. 811, 819 (Cir. Ct. Ohio, 1897), State v. Glidden is said to be the first American case in which the word is used. See, in Barr v. Essex Trades Council, 53 N. J. Eq. 101, 128; s. c., 30 Atl. Rep. 881 (1894), reference to article in 19 Irish Law Times, 572, suggesting that the method had its inspiration in the proceedings of excommunication practiced in ecclesiastical tribunals. The following are definitions of "boycott" (or "boycotting"): "To combine in refusing to work for, buy from, sell to, give assistance to, or have any kind of dealings with, and in preventing others from working for, buying from, selling to, assisting or having any kind of dealings with (a person or company), on account of political or other differences, or of disagreements in business matters, as a means of inflicting punishment, or of coercing or intimidating." Century Dictionary. "A combination between persons to suspend or discontinue dealings or patronage with another person or persons because of refusal to comply with a request made of him or them." Anderson's Law Dictionary. "A conspiracy formed and intended, directly or indirectly, to prevent the carrying on of any lawful business, or to injure the business of any one, by wrongfully preventing those who would be customers, from buying anything from or employing the representatives of said business, by threats, intimidation or other forcible means." Black's Law Dictionary. "The withdrawal for a certain purpose of the patronage of the person or persons initiating it, and of as many others as he or they can induce to join them." E. P. Cheyney in 4 Pol. Sci. Quart. 274 (1889). In Moores v. Bricklayers' Union, 7 Ry. & Corp. L. J. 108 (Super. Ct. Cinn., 1889), it is said: "The essential feature of (boycotting) is the exclusion of the employer from all communication with former customers and material-men, by threats of similar exclusion to the latter, if dealings are continued." In Toledo, Ann Arbor, etc. Ry. Co. v. Pennsylvania Co., 54 Fed. Rep. 730, 788 (Cir. Ct. Ohio, 1893), it is said: "As usually understood, a boycott is a combination of many to cause a loss to one person, by coercing others against their will to withdraw from him their beneficial business intercourse, through threats that, unless those others do so, the many will cause similar loss to them." In Crump v. Commonwealth, 84 Va. 927, 940; s. c., 6 S. E. Rep. 620 (1888), it is said: "The essential idea of boycotting, whether in Ireland or the United States, is a confederation, generally secret, of many persons whose intent is to injure another by preventing any

that coercion is an essential element of the definition.[1] It is to be noted that, leaving out of consideration the special case of inducing an employee to leave his employment, there is little if any authority for the proposition that a boycott, as we have defined it, is illegal.[2] As a rule, it is not boycotts as thus defined, but acts of coercion accompanying boycotts, that have been held illegal.[3] On the other hand,

and all persons from doing business with him, through fear of incurring the displeasure, persecution and vengeance of the conspirators." See also Hopkins v. Oxley Stave Co., 49 U. S. App. 709, 717; s. c., 88 Fed. Rep. 912, 917 (8th Cir., 1897).

[1] See definitions, p. 42, above. In State v. Glidden, 55 Conn. 46, 77; s. c., 8 Atl. Rep. 890 (1887), after referring to the account of the origin of the word (see p. 41, above), it is said: "If this is a correct picture, the thing we call a boycott originally signified violence if not murder;" also: "Instances are not wanting in our own country where the boycott has been attended with more or less violence; and it cannot be denied that the natural tendency is, especially when applied by the ignorant and vicious, to attempt to make it successful by force. It too often leads to serious disturbances of the peace." So in Brace v. Evans, 3 Ry. & Corp. L. J. 561 (Allegheny Co., Pa., Com. Pl., 1888), among the acts declared illegal was the issue of circulars bearing the words "Boycott Brace Bros." This on the theory that the word "boycott" by its very definition includes acts which tend to violence, the court saying: "The use of the word 'boycott' is in itself a threat." This decision was applied in Casey v. Cincinnati Typographical Union, 45 Fed. Rep. 135, 143 (Cir. Ct. Ohio, 1891); Barr v. Essex Trades Council, 53 N. J. Eq. 101, 121; s. c., 30 Atl. Rep. 881 (1894).

[2] It was indeed said in Thomas v. Cincinnati, N. O. & T. P. Ry. Co., 62 Fed. Rep. 803, 819 (Cir. Ct. Ohio, 1894), that "boycotts, though unaccompanied by violence or intimidation, have been pronounced unlawful in every State of the United States where the question has arisen, unless it be in Minnesota, and they are held to be unlawful in England." The reference probably is to Bohn Manuf. Co. v. Hollis, 54 Minn. 223; s. c., 55 N. W. Rep. 1119 (1893; see § 11). In Thomas v. Cincinnati, N. O. & T. P. Ry. Co., the action condemned was referred to as a "boycott," though it was unnecessary to base the decision on that ground, especially as the boycotted party was not a complainant or otherwise a party to the action. Had the boycotted party been the complainant, the case would then have been similar to that under consideration in Hopkins v. Oxley Stave Co., 49 U. S. App. 709; s. c., 88 Fed. Rep. 912 (8th Cir., 1897; see § 15).

[3] See § 14. But in Barr v. Essex

boycotts that have been held legal have, as a rule, been incidents or outgrowths of some special relation, commonly that of trade competitor.[1]

§ 10. Liability for inducing employee to quit employment, or employer to discharge employee.—We have already stated that there is nothing inherently or necessarily illegal in inducing one person to refuse to deal or continue to deal with another;[2] and that, according to authorities already considered, the act is not made illegal by an intent to injure.[3] On principle it would seem clear that the same doctrine should cover and apply to the case of inducing one person to refuse to continue to deal with another, *as employee with employer;* in other words, to quit his employment. But the accepted doctrine is otherwise, and we find the prevailing rule to be that "any person who knowingly entices away the servant of another, and thereby induces him to violate his contract with his master, or who thereby deprives the master of the services of one then actually in his service, whether under a contract to serve or not, is liable to the master for his actual loss therefrom."[4] We understand

Trades Council, 53 N. J. Eq. 101, 123; s. c., 30 Atl. Rep. 881 (1894), where an injunction was granted against boycotting the proprietors of a newspaper by labor unions, the only injury, so far as the complainants were concerned, was inducing persons to refuse to deal with them, there being concededly "no public disturbance, no physical injury, no direct threats of personal violence, or of actual attack on or destruction of tangible property as a means of intimidation or coercion."

[1] See § 11.

[2] See § 9.

[3] See § 2.

[4] So stated in Wood on Master and Servant (2d ed.), § 280. See by way of illustration, Old Dominion Steamship Co. v. McKenna, 30 Fed. Rep. 48 (Cir. Ct. N. Y., 1887). A conspicuous instance of the successful maintenance of such an action is Walker v. Cronin, 107 Mass. 555, 567 (1871), where a cause of action was held stated in a declaration setting forth contracts of the plaintiffs with their workmen for the performance of certain work in the manufacture of boots and shoes; and alleging that the defendant, "well knowing thereof, with the unlawful purpose of hindering and preventing the plaintiffs from carrying on their business, induced said persons to refuse and neglect to perform their contracts, whereby the plaintiffs suf-

the origin of this anomalous doctrine on learning that at the time of such origin servants were in effect, if not in a strict legal sense, serfs or slaves, so that an inducement to leave one's employment was not a mere inducement to refuse to continue to deal, but was an interference with a chattel belonging to the employer, being thus tantamount to trespass or larceny.[1] If such inducement is wrongful when the act of a single individual, it is, according to authorities already considered, *a fortiori* wrongful when done in pursuance of a combination to do such act.[2] In this view proof of the com-

fered great damage in their business." So, too (p. 562), of merely inducing "persons who were in the employment of the plaintiffs," and others "who were about to enter into" their employment, "to leave and abandon" it. Another conspicuous instance is Thomas v. Cincinnati, N. O. & T. P. Ry. Co., 62 Fed. Rep. 803, 816 (Cir. Ct. Ohio, 1894), where punishment was allowed for contempt for inducing the employees of a railroad receiver to leave his employ. This on the ground that any unlawful interference with the operation of a road in the hands of a receiver is a contempt, and that, if the receiver had been a private corporation, he could have recovered damages for the injury thus inflicted on the business of the road. Compare, however, Farmers' Loan & Trust Co. v. Northern Pacific R. R. Co., 60 Fed. Rep. 803, 823 (Cir. Ct. Wis., 1894). In State v. Stewart, 59 Vt. 273, 291; s. c., 9 Atl. Rep. 559 (1887), though a criminal proceeding, it was held not necessary to aver that the employer desired or intended to employ a person induced not to enter his employment; an allegation that such employer was in fact prevented from employing him being held, *ex vi termini*, to imply a purpose to employ him, which had been met and thwarted; there being also an allegation that the defendants *conspired* to hinder and prevent such employment. In Carew v. Rutherford, 106 Mass. 1, 13 (1870), an action was sustained for the recovery back of money paid in response to a demand made in pursuance of a conspiracy to induce the employee so paying to quit his employment and deter others from entering it. See Bourlier v. Macauley, 91 Ky. 135; s. c., 15 S. W. Rep. 60 (1891), as to application of Kentucky statute forbidding inducing the abandonment of a contract to labor for a fixed period.

[1] It seems clear that the doctrine can be traced to the English Statute of Laborers of the fourteenth century. See the elaborate dissenting opinion of Coleridge, J., in Lumley v. Gye, 2 El. & Bl. 216, 253 (1853).

[2] See § 4. In Webber v. Barry, 66 Mich. 127; s. c., 33 N. W. Rep. 289 (1887), it was held a trespass to

bination is superfluous so far as the mere question of civil liability is concerned. Though the mere inducement to quit employment seems of itself to create no criminal liability,[1] yet, in accordance with the general doctrine of conspiracy to do a merely *unlawful* act not criminal,[2] conspiracies to induce employees to quit their employment have been held to create a criminal liability.[3] As already noted, the rule applies whether the employee is at the time under a contract to serve or not.[4] There is doubtless a growing consciousness in the judicial mind that a doctrine so anomalous, and originating in conceptions of social relations that are utterly repugnant to those now prevailing, is ill adapted to present conditions.[5] Even long ago it was settled that an

enter with a body of men upon the premises of an employer, with the purpose of inciting his employees to strike.

[1] See Wood on Master and Servant (2d ed.), § 239.

[2] See § 8.

[3] Reg. v. Duffield, 5 Cox C. C. 404 (1851); State v. Stewart, p. 45, above.

[4] See note 4, p. 44, above. Thus, in Walker v. Cronin, 107 Mass. 555, 566 (1871), it was said, referring to Gunter v. Astor, 4 Moore, 12 (1819): "The discussion indicates that damages were considered to be recoverable for the breaking up or disturbance of the business of the plaintiff, whereby he suffered the loss of his usual profits for a long period. The grounds of damage were apparently regarded as altogether independent of the mere loss of any contracts with the workmen." So, too, the liability was declared, notwithstanding the absence of contract, in Johnston Harvester Co. v. Meinhardt, 60 How. Pr. (N. Y.) 168 (Supm. Ct., Sp. T., 1880); Lucke v. Clothing Cutters', etc. Assembly, 77 Md. 396; s. c., 26 Atl. Rep. 505 (1893), the latter a case of the notification to an employer by a labor union that in case of his retention in his employ of the plaintiff, a "customs cutter," all labor organizations in the city would be notified that his house was a non-union house. So in Vegelahn v. Guntner, 167 Mass. 92; s. c., 44 N. E. Rep. 1077 (1896), the liability was declared in the case of persons seeking to enter the employment, as well as of those already in it. See also Consolidated Steel & Wire Co. v. Murray, 80 Fed. Rep. 811, 828 (Cir. Ct. Ohio, 1897), and cases of inducing employer to discharge employee (note 3, p. 48, below). But see Chipley v. Atkinson, 23 Fla. 206; s. c., 1 So. Rep. 934 (1887); Lucke v. Clothing Cutters', etc. Assembly, above, to the effect that if the plaintiff alleges employment for a fixed period he must prove the allegation.

[5] For instance, in Rogers v. Evarts, 17 N. Y. Suppl. 264 (Supm. Ct., Sp. T., 1891), the court questioned

exception should be made of cases of ignorance by the inducing party of the relationship of employee and employer.[1] And there is perhaps observable a tendency to introduce, by way of modification, a rule that when fully developed will be as follows: *The test of liability for inducing an employee to quit his employment is whether the act of inducement was the incident or outgrowth of some existing lawful relation.*[2] But inasmuch as the doctrine is so deeply imbedded in the

the soundness of the doctrine, and refused an injunction against acts within such doctrine, on the ground that the case was one of doubtful right.

[1] Wood on Master and Servant (3d ed.), § 288.

[2] Thus, the relation of *party to a contract.* This seems to be the ground of the decision in Raycroft v. Tayntor, 68 Vt. 219; s. c., 35 Atl. Rep. 58 (1896), holding that no action would lie for causing the discharge of an employee, by threatening the employer to terminate a contract that the defendant had the right to terminate at any time. See also § 2, p. 8, above. So the relation of *employee.* Thus, in Rogers v. Evarts, 17 N. Y. Suppl. 264 (Supm. Ct., Sp. T., 1891), it was held lawful for striking workmen to induce others to leave their employment by "persuasion and entreaty," the court saying that their action was "for an advantage in their business, which they had the right to seek by all lawful means." It was also held not unlawful to offer money as an inducement to quit. In Clemmitt v. Watson, 14 Ind. App. 88; s. c., 42 N. E. Rep. 367 (1895), it was held not actionable, in the absence of contractual relations, for two or more employees (in a coal mine) to cause the discharge of a co-employee by agreeing to quit work and thus stop the working of the mine, unless he was discharged; or to cause the stopping of such work, so that he was thrown out of employment, by quitting work pursuant to agreement, upon the refusal of the employer to discharge him. In Chipley v. Atkinson, 23 Fla. 206; s. c., 1 So. Rep. 934 (1887), it does not clearly appear what the relation of the defendant to the matter was. This is distinguishable from Lucke v. Clothing Cutters', etc. Assembly, 77 Md. 396; s. c., 26 Atl. Rep. 505 (1893), (which followed Chipley v. Atkinson), where the defendants were a labor union composed of persons engaged in the same line of occupation as the plaintiff. The question might have been raised whether, assuming the absence of coercion, the similarity or solidarity of interest did not furnish a sufficient basis for the legality of the action. See § 12. The same observations seem applicable to Coons v. Chrystie, N. Y. Law Jour., July 21, 1898 (Supm. Ct., Sp. T.), where an organization of master plumbers and its officers were enjoined from "calling out" the plaintiff's employees on the

law, it is better to obtain relief against it by means of legislation[1] than by the slow process of judicial modification. The practical mischief produced by allowing this doctrine to stand we shall presently consider, when we find that it has been extended from the mere relation of employer and employee to the relations of life generally.[2] In this connection, however, we may note its converse application, namely, so as to create a liability for inducing an employer to refuse to continue to deal with an employee; in other words, to discharge him from employment.[3]

ground that he was not a member of the organization. It was so held against the contention that "the workmen had agreed with the defendant society that they would not accept employment from unaffiliated persons, such as the plaintiff, and that by causing them to cease work the defendants merely caused the workmen to keep their promise," the court saying: "It may be true that such an agreement would be valid as between the society and its members." In Walker v. Cronin, 107 Mass. 555, 563 (1871), it was intimated that the inducement is not unlawful if merely in the course of the exercise of the right to employ workmen in one's own business.

[1] See, for instance, Appendix, and particularly New Jersey act of 1883 (ch. 287). See Mayer v. Journeymen Stonecutters' Assoc., 47 N. J. Eq. 519, 531; s. c., 20 Atl. Rep. 492 (1890); Barr v. Essex Trades Council, 53 N. J. Eq. 101, 119; s. c., 30 Atl. Rep. 881 (1894); Farmers' Loan & Trust Co. v. Northern Pacific R. R. Co., 60 Fed. Rep. 803, 815 (Cir. Ct. Wis., 1894).

[2] See § 18.

[3] Hollenbeck v. Ristine, — Iowa, —; s. c., 75 N. W. Rep. 355 (1898). So notwithstanding the absence of a contract for any fixed period. Chipley v. Atkinson, 23 Fla. 206; s. c., 1 So. Rep. 934 (1887); Dannerberg v. Ashley, 10 Ohio Cir. Ct. 558 (1894); Perkins v. Pendleton, 90 Me. 166; s. c., 38 Atl. Rep. 96 (1897; here, however, there was an accompaniment of threats, etc., as to which see § 15). So in Connell v. Stalker, 20 Misc. 423; s. c., 45 N. Y. Suppl. 1048 (N. Y. City Ct., 1897), affirmed in 21 Misc. 609; s. c., 48 N. Y. Suppl. 77 (1897), where it does not appear that there was such a contract. So in State v. Donaldson, 32 N. J. Law, 151 (1867), it was held an indictable offense for workmen to combine to compel their employer to discharge certain of their fellow-workmen, the means adopted to enforce this concession being an announced determination to quit their employment in a body and by a simultaneous act. The authorities relied on are two English *nisi prius* cases, where the point was but briefly considered, Rex v. Ferguson, 2 Starkie, 431 (1819); Rex v.

§ 11. Boycott by trade competitor.—We have already asserted the doctrine that *the existence of the relation of trade competitor justifies acts that are the natural incident or outgrowth of such relation, whether or not done with the direct intent to injure one's rival.*[1] As the very essence of competition in trade consists in the effort to divert business to oneself at the expense of one's rivals,[2] it seems almost

Bykerdike, 1 Moody & Rob. 179 (1832). Compare People v. Trequier, 1 Wheeler Cr. Cas. (N. Y.) 142 (1823); People v. Melvin, 2 Id. 262 (1810); Master Stevedores' Assoc. v. Walsh, 2 Daly, 1, 13 (1867); Reg. v. Hewitt, 5 Cox C. C. 162 (1851); Reg. v. Bunn, 12 Id. 316 (1872). To similar effect with State v. Donaldson is State v. Dyer, 67 Vt. 690; s. c., 32 Atl. Rep. 814 (1895), though here it does not appear that the guilty parties were employees; nor indeed does it appear what was their previous relation to the matter. On the other hand, in Commonwealth v. Hunt, 4 Metc. (Mass.) 111, 128 (1842), it was held not unlawful for employees to "form themselves into a society and agree not to work for any person who should employ any journeyman or other person not a member of such society, after notice given him to discharge such workman." (The court, however, interpreted such agreement as not applying to the discharge of a person "engaged by contract for a certain time, in violation of such contract"), (p. 130). And this accords with what is now the settled law in England. See Allen v. Flood, L. R. App. Cas. (1898), 1. See §§ 6, 12. Commonwealth v. Hunt is in State v. Donaldson, 32 N. J. Law, 151, 157 (1867), distinguished on what seems to us to be the unsubstantial ground, that the agreement to quit employment was in the form of a *regulation of the society*, and not specifically directed against any particular individual, or, to use the language of the court: "The force of this association was not concentrated with a view to be exerted to oppress any individual." Commonwealth v. Hunt is distinguished on the same ground in Crump v. Commonwealth, 84 Va. 927, 943; s. c., 6 S. E. Rep. 620 (1888). In an action for causing discharge from employment, recovery was allowed for the amount of wages that the plaintiff would have earned during the period that he was deprived of employment, and he was held not obliged to seek employment elsewhere. Connell v. Stalker, 20 Misc. 423; s. c., 45 N. Y. Suppl. 1048 (N. Y. City Ct., 1897); affirmed in 21 Misc. 609; s. c., 48 N. Y. Suppl. 77 (1897).

[1] See § 5.

[2] Very suggestive is the following statement in the dissenting opinion of Holmes, J., in Vegelahn v. Guntner, 167 Mass. 92, 106; s. c., 44 N. E. Rep. 1077 (1896), with reference to the limits of lawful interference with the business of a trade rival. "We all agree, I pre-

difficult to understand how there ever originated the idea that there is anything inherently unlawful in an individual, or a combination of individuals, inducing others to refrain from dealing with a competitor in trade. But perhaps it may be said of the authorities that apparently go to that length, that they proceed on the supposition of the existence of coercion, as an element in addition to the mere inducement to refrain from dealing.[1] Furthermore they proceed on the basis of the doctrine already considered, that an act entirely lawful, if done by a single individual, may be unlawful by reason of being done in pursuance of a combination of individuals to do the same act.[2] Hence the question usually arises in connection with the operations of those who, by virtue of their numbers or the extent of their operations, or both, control business throughout a wide area, and within such limits, at least, are able to drive from the field of competition the person against whom the boycott is directed.[3] Sometimes the inducement is of refusal to *buy*,

sume, that it may be done by persuasion to leave a rival's shop and come to the defendants'. It may be done by the refusal or withdrawal of various pecuniary advantages which, apart from this consequence, are within the defendants' lawful control. It may be done by the withdrawal, or threat to withdraw, such advantages from third persons who have a right to deal or not to deal with the plaintiff, as a means of inducing them not to deal with him either as customers or servants."

[1] See § 14.

[2] See § 4.

[3] On this subject the authorities, all very recent, are in apparently hopeless conflict. In harmony with the views stated in the text is the well-considered case of Bohn Manuf. Co. v. Hollis, 54 Minn. 223; s. c., 55 N. W. Rep. 1119 (1893), involving the legality of an agreement contained in the by-laws of an association composed of from twenty-five to fifty per cent. of the retail lumber dealers in Iowa, Minnesota, Nebraska and the Dakotas, not to deal with any wholesale dealer or manufacturer selling directly to customers, not dealers, at a point where a member of the association might be doing business, such agreement providing for notice being given to all the members whenever a wholesale dealer or manufacturer made such sale. An application by a wholesale manufacturer and dealer in lumber for an injunction against issuing such notice, and from stating or mailing any matter that might injure its trade or business, and from combining with others to hinder or limit its sales

sometimes of refusal to *sell;* but it does not appear that, as between these classes of cases, there is any difference as to the rule of liability applicable.

and transactions, was refused. This decision was followed in Macauley v. Tierney, 19 R. I. 255; s. c., 33 Atl. Rep. 1 (1895), sustaining an agreement by an association of master plumbers not to deal with dealers in plumbing materials selling to other than master plumbers, in a suit by plumbers, not members of the association, to restrain the performance of acts under the agreement. See criticism of Bohn Manuf. Co. v. Hollis, in Hopkins v. Oxley Stave Co., 49 U. S. App. 709, 721; s. c., 83 Fed. Rep. 912, 920 (8th Cir., 1897). But there are decisions in conflict with those just considered. Thus, in Jackson v. Stanfield, 137 Ind. 592, 607; s. c., 36 N. E. Rep. 345 (1894), an agreement contained in the constitution of an association of about one hundred and fifty retail lumber dealers provided thus, as stated by the court: "The regular dealer, when his territory is encroached upon by a wholesale dealer or manufacturer, is authorized to notify the person so offending that he has a claim against him for such sale or shipment, and to make a demand therefor. If the parties cannot adjust it, it is made the duty of the member to notify the secretary of the facts in the case, who shall refer the matter to the executive committee, whose duty it is to hear the grievances and determine the claim. If the wholesaler or manufacturer ignores the decision of the committee, it is the duty of the secretary to notify the members of the association of the name of the person so offending, and of the members to no longer patronize him. If they continue to deal with the offender, they shall be expelled from the association; and if any member refuses to abide by the decision of the executive committee, his name is to be stricken from the membership of the society. The facts found by the court disclose that the appellees, as members of the combination complained of, availed themselves of the means provided for in § 8, to destroy the business of the appellants (plaintiffs) as brokers in lumber, because they were not retail dealers within the definition of the term, and that they effectuated their purpose. The special findings of fact clearly show it to be a compact to suppress the competition of those dealers who did not own yards with an adequate stock on hand, by driving them out of business. By this plan they reach the wholesale dealer and compel him to pay an arbitrary penalty, under a threat of financial injury, and they force him to assist in ruining the dealer who does not own a yard." An action for an injunction and for damages as for conspiracy, was sustained by a broker who had purchased from a wholesale dealer against whom the association enforced the penalty, and which, fearing a repetition thereof, re-

§ 12. Boycott by employee.— Again assuming the necessity of some special relation, to justify inducing a refusal to deal, it would seem on principle that the relation of employee is sufficient. That is to say, the relation of employee to employer is, if not strictly that of a competitor in trade, yet sufficiently analogous to it to justify the employee, in case of dispute with his employer, in inducing third persons to refuse to deal with the employer, as a means of inducing the employer to yield to the demands of the employee. That there is nothing necessarily unlawful in this seems to be the rule.[1]

fused to again deal with the plaintiff. So in Olive v. Van Patten, 7 Tex. Civ. App. 630; s. c., 25 S. W. Rep. 428 (1894), the decision in Delz v. Winfree, 80 Tex. 400; s. c., 16 S. W. Rep. 111 (1891) (see § 9, p. 39, above), was followed in sustaining an action by a lumber dealer against an association of such, it being alleged that, because of his refusal to join such association, they maliciously distributed circulars asking that patronage be withdrawn from him until he agreed not to sell to others than dealers, thereby influencing others not to deal with him. On the same principle is sustainable, if at all, Dueber Watch-case Co. v. Howard Watch & Clock Co., 3 Misc. 582; s. c., 24 N. Y. Suppl. 647 (Supm. Ct., Sp. T., 1893). But see § 29. Compare People v. Duke, 19 Misc. (N. Y.) 292 (N. Y. Co. General Sessions, 1897).

[1] Thus, where a controversy was in existence between a combination of employers and one of employees, an injunction against the issuance by such employees of circulars requesting the customers of certain members of the combination of employers not to deal with them was refused, there being no proof of "violence, injury to property, threats or intimidation." The court say: "At best the circulars were but one of the instruments used by the defendants in their contest with the association of which the plaintiffs were members." Sinsheimer v. United Garment Workers, 77 Hun, 215; s. c., 28 N. Y. Suppl. 321 (1894). The court broadly declare the right of the defendants "to endeavor to persuade those who had been accustomed to deal with" members of the association (to which the plaintiffs belonged) to discontinue their trade. The decision seems, however, to mainly rest on the fact that the plaintiffs did not come into court "with clean hands," being members of a combination of employers who had employed methods similar to those that they now complained of. Compare, as to methods adopted by way of retaliation, Barr v. Essex Trades Council, 53 N. J. Eq. 101, 126; s. c., 30 Atl. Rep. 881 (1894). There is a *dictum* (in Sinsheimer v. United Garment Workers) that the combination of employers "had the right to lock out all operatives connected with the defendants' association because of de-

But the question of greatest difficulty arises in applying the rule to what we may consider as a conflict of the "solidarity of interest" of a number of employees as against one or more employers. Conceding that, in case of dispute between an employee and his immediate employer, it is lawful for the former to employ the boycott as a weapon, is it lawful for others, not employees of such employer, but moved by the solidarity of interest of a body of employees engaged in the same general occupation, to employ the same weapon in the same dispute? For instance, the employees in an iron mill engage in a dispute with their employer, and lawfully, as we here assume, employ the boycott as a weapon. Is it likewise lawful for other members of a union, say of all employees in iron mills throughout the country, to intervene in this particular dispute and boycott this particular employer, though, apart from their relation as members of this union, having no dispute with this employer or any other employer? Thus far it would seem that the judicial mind has not risen to the point of regarding this solidarity of interest of a large number of employees engaged in the same general occupation, as constituting a sufficient basis on which to establish the legality of a boycott.[1] It would seem, however,

mands, which they considered unjust, made by the defendants upon one of their number." This was a reversal of 5 Misc. 448; s. c., 26 N. Y. Suppl. 152 (1893), holding that "it was clear that it was an unlawful injury to plaintiffs' property to send circulars to their customers which would tend to induce such customers to discontinue business with the plaintiff." This decision we regard as a sound one and in harmony with modern requirements, but it seems doubtful whether it is in harmony with the current of authority. See note 1, below. In Lyons v. Wilkins, 1 L. R. Ch. (1896), 811, inducing persons not to enter the employment of a person against whom a strike had been declared was held unlawful under the prohibition of the Conspiracy and Protection of Property Act of 1875, against "*watching and besetting*" a residence or place of business.

[1] That, however, there is a tendency in that direction appears from what will doubtless be the celebrated case of Allen v. Flood, L. R. App. Cas. (1898), 1, where the defendant, a "delegate" of a trade union, procured the discharge of the plaintiffs, day laborers (with a promise not to employ them again), by stating to the employers that members of the union in their em-

that the subject deserves a fuller examination before the law on this subject is allowed to be settled in the lines thus far tentatively established, especially as in somewhat analogous

ploy would quit employment unless the plaintiffs were discharged. The plaintiffs had become offensive to ironworkers who were not only members of the union, but also their fellow-employees, by reason of having, though shipwrights, previously worked for certain employers on "ironwork." The decision proceeded on the express supposition that this was not a case of breach of contract, but merely of discharge from employment (pp. 97, 118, 147). The court say (p. 132): "The object which the defendant and those whom he represented had in view throughout was what they believed to be *the interest of the class to which they belonged;* the step taken was a means to that end." See also p. 168. Allen v. Flood has already been followed in this country, as applicable to the case of a labor union procuring the discharge of a non-union employee, by an announcement of an intention to order members of the union to leave the employment of the same employer. Davis v. United Portable Hoisting Engineers, 28 N. Y. App. Div. 396; s. c., 51 N. Y. Suppl. 180 (1898). So the announcement of such intention under such conditions was, in People v. Davis, 57 Alb. Law Jour. 170 (Cook Co., Ill., Crim. Court, 1898), following Allen v. Flood, held not within the prohibition of a statute against "conspiring or agreeing together with the fraudulent or malicious intent wrongfully and wickedly to injure the person, character, business, or employment or property of another." Here, however, it did not appear that there was any contract of employment for any definite period. Compare, however, Connell v. Stalker, 20 Misc. 423; s. c., 45 N. Y. Suppl. 1048 (N. Y. City Ct., 1897); affirmed in 21 Misc. 609; s. c., 48 N. Y. Suppl. 77 (1897). See also, as to the solidarity of interest of employees, the vigorous argument of Caldwell, J., dissenting in Hopkins v. Oxley Stave Co., 49 U. S. App. 709, 745; s. c., 83 Fed. Rep. 912, 935 (8th Cir., 1897). But in Toledo, Ann Arbor, etc. Ry. Co. v. Pennsylvania Co., 54 Fed. Rep. 730 (Cir. Ct. Ohio, 1893), an injunction was granted against the enforcement of any rule of a labor union (The Brotherhood of Locomotive Engineers) requiring railroad employees to refuse to handle and deliver freight transported by or to a certain company, and against inducing them to refuse to extend to such companies facilities for exchange of traffic. This was simply the case of the refusal of employees to do their work. It does not appear that they were under contract. The court sought to justify the injunction on the ground that the intent of the employees was to induce their respective companies to refuse to deal with such other company, with the ultimate purpose of inducing the latter to discharge certain employees (engineers) not

cases solidarity of interest has been recognized as constituting such a sufficient basis.[1]

§ 13. Liability for inducing breach of contract.—The anomalous doctrine that it is actionable to induce an em-

members of the Brotherhood. In the view we have elsewhere taken the intent should have been disregarded. But, waiving that point, the question is whether the intent was to do anything unlawful. Stress was laid on the circumstance that the employees taking such action "were not dissatisfied with the terms of their employment." But the point was, not what were their relations to their immediate employers, but what to the boycotted company. Was not their interest as members of a large labor organization sufficient to justify the boycott, because of the refusal of the boycotted company to discharge persons objectionable to them as not being members of the union? The decision, however, was based, not solely on the ordinary rules applicable to boycotts, but on the additional ground that the refusal to handle interstate freight was in direct violation of the Interstate Commerce Law. Judge Taft, who made the decision herein, had also made the decision in Moores v. Bricklayers' Union, 7 Ry. & Corp. L. J. 108 (Super. Ct. Cinn., 1889), where an action was sustained against a labor union and members thereof, for damage consisting of withdrawal of custom caused by sending to the plaintiff's customers notice that members of the union would not use material supplied by the plaintiff, the motive of such action being the refusal of the plaintiff to accede to the defendants' request to refuse to deal with persons (P. Bros.) with whom, as employees, they had a controversy. Here again we submit that the real question was whether the relation *between the defendants and P. Bros.* was not such as to justify the defendants in using the boycott as a weapon. In this view the following considerations advanced by the court seem to us to be entirely irrelevant: "The dealings *between P. Bros. and their material-men*, or *between such material-men and their customers*, had not the remotest natural connection either with defendants' wages or their terms of employment. There was no competition or possible contractual *relation between plaintiffs and defendants*, where their interests were naturally opposed. The right of the plaintiffs to sell their material was not one which in its exercise brought them into legitimate conflict with the right of defendants to dispose of their labor as they chose." But, as in the authorities just considered, the mere relation of membership in the same

[1] Thus, the interest of a number of tradesmen to protect themselves against dishonest debtors, and the interest of a number of employers in a contest with employees. (See § 9, pp. 39, 40, above.)

ployee to break his contract of employment, has within a comparatively recent period been enlarged into the doctrine

labor organization with an employee having a dispute with his employer has thus far been generally regarded as an insufficient basis for the right to boycott such employer. Thus, in Old Dominion Steamship Co. v. McKenna, 30 Fed. Rep. 48 (Cir. Ct. N. Y., 1887), where the boycott was by what was known as the "Executive Board of the Ocean Association of the Longshoremen's Union." It would seem, though it does not distinctly so appear, that the employees in whose behalf the boycott was instituted were members thereof, but the court say that the defendants were "not in plaintiff's employ," and acted "without any legal justification, so far as appears,—a mere dispute about wages, the merits of which are not stated, not being any legal justification." So in Barr v. Essex Trades Council, 53 N. J. 101, 115, 136; s. c., 30 Atl. Rep. 881 (1894), an injunction was allowed on complaint of the proprietors of a newspaper (the "Newark Times") against a boycott by a number of labor unions representing different trades in Newark, and affiliated in a society or representative body. The members of only one of these unions had any grievance against the complainant, the action of the others being sympathetic. The injunction was one "restraining them from distributing or circulating any circulars, printed resolutions, bulletins or other publications containing appeals or threats against the Newark Times or the complainants, its publishers, with the design and tending to interfere with their business in publishing said paper, and from making any threats or using any intimidation to the dealers or advertisers in such newspaper, tending to cause them to withdraw their business from such newspaper." The grievance against the Times was its refusal to discontinue the use of "plate matter" for its paper (p. 106). Such boycott was held not legalized by the New Jersey act of 1883. See § 10. So in Casey v. Cincinnati Typographical Union, 45 Fed. Rep. 135 (Cir. Ct. Ohio, 1891), an injunction was granted under similar conditions, the grievance being the refusal of the proprietor to "unionize" his office, that is to say, publish his paper according to the customs and regulations laid down and prescribed by the union, and pay wages at the rates fixed by it, and discharge all persons not members thereof. So in Hopkins v. Oxley Stave Co., 49 U. S. App. 709, 722; s. c., 83 Fed. Rep. 912, 921 (8th Cir., 1897), a case of a "threat," or announcement of intention to boycott (see § 15), the court say: "With one exception the members of the combination were not in the employ of the plaintiff company;" and it is also stated that no reduction of wages had been threatened by the company. A conspicuous instance of a boycott by employees, declared illegal, is Thomas v. Cincinnati, N. O. & T.

that it is actionable to induce another to break his contract;[1] that is to say, the doctrine has been extended from contracts of employment to contracts generally. The objections to such a doctrine on principle are serious and have been clearly

P. Ry. Co., 62 Fed. Rep. 803, 807 (Cir. Ct. Ohio, 1894). The plan of the boycott is thus set forth: "Pullman cars are used on a large majority of the railways of the country. The members of the American Railway Union whose duty it was to handle Pullman cars on such railways were to refuse to do so, with the hope that the railway companies, fearing a strike, would decline further to haul them in their trains, and inflict a great pecuniary injury upon the Pullman company. In case the railway companies failed to yield to the demand, every effort was to be made to tie up and cripple the doing of any business whatever by them, and particular attention was to be directed to the freight traffic, which it was known was their chief source of revenue. . . . It was to be accomplished, not only by the then members of the union, but also by procuring, through persuasion and appeal, all employees not-members, either to join the union or to strike without joining, by guaranteeing that, if they would strike, the union would not allow one of its members to return to work until they also were restored." The decision might, it would seem, have been sustained solely on the ground of the illegality of inducing employees to quit their employment. (See § 10, p. 45, above.) In this view it was unnecessary to inquire into the *intent* of the act of inducing, which was to induce the employer to refuse to deal with, in other words, to boycott, a third person. If, according to the authorities just considered, the relation of membership in the same labor organization is an insufficient basis for a boycott, *a fortiori* was the boycott illegal in that case, as it was instituted in behalf of persons (employees of the Pullman Palace Car Company) who were not members of the Railway Union. This decision was applied to the same general state of facts in United States v. Cassidy, 67 Fed. Rep. 698, 763 (D. Ct. Cal., 1895). Compare as to threats to boycott, cases considered in § 15. Boycotts by employees were held in Brace v. Evans, 3 Ry. & Corp. L. J. 561 (Allegheny Co., Pa., Com. Pl., 1888), not to be legalized by Pennsylvania legislation of 1869, 1872, 1876 (see Appendix), except by relieving the persons committing the acts specified, from the penalties of crime.

[1] In accord with the view expressed in the text is Boyson v. Thorn, 98 Cal. 578; s. c., 33 Pac. Rep. 492 (1893), where it was held broadly that no action lies against one "who, from malicious motives, but without threats, violence, fraud, falsehood, deception or benefit to himself, induces another to violate his contract with the plaintiff." So in Ashley v. Dixon, 48 N. Y. 430 (1872), it was held broadly that

seen. It violates the fundamental maxim that only the proximate, and not the remote, cause of an injury is to be considered by the law. Furthermore, the legal remedy against

no action lies in such case, in the absence of *fraud or misrepresentation*. It is to be noted that the cases holding it actionable to induce, by *fraud or misrepresentation*, non-fulfillment by a third person of his contract have been regarded as standing on a different basis from those already considered, though perhaps, even as to cases of fraud and misrepresentation, the theoretical objections stated in the text apply. Such cases are Benton v. Pratt, 2 Wend. (N. Y.) 385 (1829); Rice v. Manley, 66 N. Y. 82 (1876); Snow v. Judson, 38 Barb. (N. Y.) 210 (1862); Angle v. Chicago, St. Paul, etc. Ry. Co., 151 U. S. 1, 13; s. c., 14 Supm. Ct. Rep. 240 (1894); Morgan v. Andrews, 107 Mich. 33; s. c., 64 N. W. Rep. 869 (1895); Green v. Button, 2 Crompton, M. & R. 707 (1835); Lally v. Cantwell, 30 Mo. App. 524 (1888). Compare Chambers v. Baldwin, 91 Ky. 121; s. c., 15 S. W. Rep. 57 (1891). But on the other hand, the following authorities hold that it is actionable to induce another to break his contract: Lumley v. Gye, 2 El. & Bl. 216 (1853); Bowen v. Hall, 6 L. R. Q. B. D. 333 (1881): Jones v. Stanly, 76 N. C. 355 (1877); Walker v. Cronin, 107 Mass. 555, 567 (1871); Gore v. Condon, — Md. —; s. c., 39 Atl. Rep. 1042 (1898, inducing tenants to refuse to pay rent); Doremus v. Hennessy, 62 Ill. App. 391 (1895); McDonald v. Edwards, 20 Misc. 523; s. c., 46 N. Y. Suppl. 672 (Supm. Ct., Sp. T. 1897, *dictum*. But see Ashley v. Dixon, above). See Perkins v. Pendleton, 90 Me. 166; s. c., 38 Atl. Rep. 96 (1897). In Nashville, Chattanooga, etc. Ry. Co. v. McConnell, 82 Fed. Rep. 65, 71 (Cir. Ct. Tenn., 1897), an injunction was granted on the application of a railroad company, against the action of ticket-brokers in procuring the use by third persons of special contract tickets issued by the company, such use being in violation of the contract under which the tickets were issued, which confined such use to the original purchasers. See, as to liability to landlord for ouster of tenant, Walden v. Conn, 84 Ky. 312; s. c., 1 S. W. Rep. 587 (1886); Aldridge v. Stuyvesant, 1 Hall (N. Y.), 210 (1828). Sometimes the doctrine is by the terms of its statement limited to *maliciously* inducing, but, as elsewhere seen, this apparent qualification is of little practical consequence. In Nashville, etc. Ry. Co. v. McConnell, above, it was declared that there was no malice in the case, beyond the desire "to make an unlawful gain to the detriment of one of the parties to the contract." But, notwithstanding the decisions in Lumley v. Gye and Bowen v. Hall, which originated the doctrine, both in this country and in England, it may be doubted, in view of the decision in Allen v. Flood, L. R. App. Cas. (1898), 1, 123, 151, 171, whether that doctrine now prevails in England. See, on the general subject, note in 32 Cent.

the party breaking the contract is ample.[1] Assuming, however, that it is otherwise actionable to induce another to break his contract, there is yet room for the doctrine (which we may consider as an application of the more general doctrine already stated) that *the act of inducing another to break his contract is justifiable, if such act is the natural incident or outgrowth of some existing lawful relation*,[2] conspicuously those of trade competitor[3] and of em-

Law Jour. 275 (1891); article by A. L. Tidd in 40 Id. 86 (1895); article in 21 Am. Law Rev. 764 (1887), by J. H. Wigmore, on "Interference with Social Relations." As to necessity of proving actual damage in such case, see Exchange Telegraph Co. v. Gregory, 1 L. R. Q. B. (1896), 147.

[1] See Vicars v. Wilcocks, 8 East, 1 (1806), and note thereto in 3 Smith's Leading Cases, 1807 (9th Am. ed.); also the elaborate dissenting opinion of Coleridge, J., in Lumley v. Gye, 2 El. & Bl. 216 (1853); also dissenting opinion of Coleridge, J., the younger, in Bowen v. Hall, 6 L. R. Q. B. D. 333 (1881); also Van Horn v. Van Horn, 52 N. J. Law, 284; s. c., 20 Atl. Rep. 485 (1890); Lynch v. Knight, 9 House of Lords Cases, 577 (1861).

[2] See § 2. As illustrating the extent to which this element of the relation of the plaintiff has been ignored by the courts, it is interesting to compare Boyson v. Thorn, 98 Cal. 578; s. c., 33 Pac. Rep. 492 (1893), with Jones v. Stanly, 76 N. C. 355 (1877). In the former the agent of a hotel proprietor induced him to break his contract to furnish accommodations in the hotel. What the relation of the agent was does not otherwise appear. In the latter the president, who was also the superintendent of a railroad corporation, induced it to break its contract for the transportation of railroad ties. Here too the relation of the president does not otherwise appear. In these two cases the relations of the parties were very similar. In neither was the relation discussed as bearing on the question of liability. In Walker v. Cronin, 107 Mass. 555 (1871), where the general subject was very elaborately discussed, there is nothing to show what the relation of the defendant was, nor does it seem to have occurred to the court or any one else connected with the case, that it was at all worth the while to inquire.

[3] Directly in point as sustaining the text is Chambers v. Baldwin, 91 Ky. 121; s. c., 15 S. W. Rep. 57 (1891), where a trade competitor caused the breach of a contract to sell goods, with the design of himself becoming purchaser, and the decision is in part at least expressly based on the ground that the act was in the course of trade competition. The court say (p. 130): "If the motive influencing every business transaction that may result in injury or inconvenience to a busi-

ployee.[1] In accordance with what has already been said, the intent of the act should be entirely ignored.[2]

ness rival was made the test of its legality, litigation and strife would be vexatiously and unnecessarily increased, and the sale and exchange of commodities very much hindered." So in Bourlier v. Macauley, 91 Ky. 135; s. c., 15 S. W. Rep. 60 (1891), it was held proper for a rival theatrical manager to induce an actress to break her engagement at another theater for the purpose of performing at his own. Compare Lumley v. Gye, 2 El. & Bl. 216 (1853). On the same ground is perhaps to be sustained McCann v. Wolff, 28 Mo. App. 447 (1888), where the action was held not maintainable, on the ground that there was neither malice nor fraud. Here the defendant, claiming a commission on a sale of real estate, carried out his threat to break up the sale unless the plaintiff paid him such commission, thus depriving the plaintiff, a real-estate broker who had negotiated the sale, of his commission. It would seem that, according to some authorities, this was a *malicious* act, though malice was not in terms charged. In each of the following cases the act of inducement was by a competitor in trade, though no attention was paid by the court to that circumstance: Lumley v. Gye, 2 El. & Bl. 216 (1853); Doremus v. Hennessy, 62 Ill. App. 391 (1895; defendants members of a trade organization, and actuated by the refusal of the plaintiffs to increase her prices to those fixed by the association).

[1] In Temperton v. Russell, 1 L. R. Q. B. (1893), 715, the defendants,

[2] The doctrine is commonly limited in its statement to *malicious* inducement. Thus, in Temperton v. Russell, 1 L. R. Q. B. (1893), 715, it is said that "it is actionable to *maliciously* induce a person to break a contract." See remarks of Lord Esher in Flood v. Jackson, 2 L. R. Q. B. (1895), 21; reversed in Allen v. Flood, L. R. App. Cas. (1898), 1, where, though the case was one of merely inducing a refusal to deal, it was argued that liability for inducing breach of a contract does not depend on the existence of *malice*, it being enough that the breach is "wilfully and knowingly procured." As seems clear, however, from the application of the doctrine to the acts of trade competitors, for instance, (see note 3, p. 59, above), malice includes cases where the motive is to obtain a benefit for oneself. Indeed, it is said in Bowen v. Hall, 6 L. R. Q. B. D. 333, 338 (1881): "If the persuasion be used for the indirect purpose of injuring the plaintiff, *or of benefiting the defendant at the expense of the plaintiff*, it is a malicious act, which is in law and in fact a wrong act, and therefore a wrongful act, and therefore an actionable act if injury ensues from it." S. P., Walker v. Cronin, 107 Mass. 555 (1871). In this view, the only possible case of inducing the breach of a contract without malice would seem to be where the offending party, *ignorant of the existence of a contract*, supposes that he is merely inducing refusal to deal.

§ 14. Legality of acts accompanying strikes and boycotts and producing injury.— In the view already taken, a strike is entirely lawful, as a mere refusal to continue to deal, more specifically as a quitting of employment; a boycott is entirely lawful, as a mere inducing to refuse to deal or to continue to deal. Nevertheless the idea has extensively prevailed that strikes and boycotts are inherently unlawful. This idea has largely resulted from the circumstance that *the acts accompanying* strikes and boycotts are frequently unlawful. That, so far as legal liability is concerned, there is no necessary connection between a strike or a boycott and an act accompanying the same, is easily shown by illustration. An employee refuses to continue to deal with his employer, his motive being to induce the employer to pay higher wages. The employer continues to refuse to pay higher wages, and, after an interval, the employee, either with the same motive, to induce the employer to pay higher wages, or from the pure motive of revenge, commits a physical

though not employees, stood in the relation already considered, of members of a labor organization, having a dispute with the plaintiff, thus furnishing an opportunity for raising the question whether the "solidarity of interest" did not furnish a sufficient basis to sustain the legality of the act. But the court paid no attention to the existence of such relation. The action was by a master mason and builder against officers and members of a joint committee of three trades unions (of bricklayers, "builders' laborers" and plasterers, respectively) for inducing persons who had contracted to furnish materials to the plaintiff to break their contracts, and for conspiring to induce them not to enter into contracts with him. The grievance of the unions was that the plaintiff continued to supply building materials to a firm of builders that had refused to obey certain rules laid down by the unions with regard to building operations. Compare, however, Allen v. Flood, L. R. App. Cas. (1898), 1. The difficulties incident to applying the doctrine without qualification to acts supported by the relation of employee, were appreciated by Smith, J. (in Temperton v. Russell), who, in answer to the objection that those inducing a strike would be liable in case of the employees being under contract, said: "The present is a very different case to that suggested, viz., the merely calling out men on strike, though it does appear to me that, if a strike were used for the purpose and with the intent above mentioned, an action would lie."

assault upon the employer or destroys his property. This act is, as we assume, illegal as contrary to the civil or criminal law, or both; but it is or should be clear, that the illegality of such act in no way makes illegal the previous legal act of refusing to continue to deal, any more than the previous legal act of refusing to continue to deal makes legal the illegal act of assault or destruction of property. Leaving then out of consideration, for the present, the question of the legality of acts of refusal to deal or to continue to deal, or of inducing to refuse to deal or to continue to deal, whatever the intent of such acts, or whether done by single individuals or by combinations of individuals, we confine our attention to acts that, though as to conditions of time and place accompanying strikes and boycotts, are, in a legal sense, absolutely disconnected from them. As to acts of direct violence to person or tangible property, little need be said, as they are so universally regarded as creating a civil or criminal liability, or both.[1] But it is generally recognized that within the scope of such illegal acts must be included not only such acts of direct violence, but acts *producing a fear* of violence, to person or property.[2] The influence of such

[1] For instances, see § 16. See also Arthur v. Oakes, 24 U. S. App. 289, 261; s. c., 63 Fed. Rep. 310, 324 (7th Cir., 1894), modifying Farmers' Loan & Trust Co. v. Northern Pacific R. R. Co., 60 Fed. Rep. 803 (Cir. Ct. Wis., 1894); United States v. Elliott, below. In Re Debs, 158 U. S. 564; s. c., 15 Supm. Ct. Rep. 900 (1895), affirming United States v. Debs, 64 Fed. Rep. 724 (Cir. Ct. Ill., 1894), the power of the Federal government to remove obstructions to the passage of interstate commerce, or the carrying of the mail, was asserted as against striking railroad employees, without in any way questioning their right to strike. See also United States v. Elliott, 62 Fed. Rep. 801 (Cir. Ct. Mo., 1894); 64 Id. 27 (Cir. Ct. Mo., 1894); United States v. Cassidy, 67 Id. 698 (Dist. Ct. Cal., 1895); Re Grand Jury, 62 Fed. Rep. 828 (Cir. Ct. Ill., 1894); Re Grand Jury, Id. 884 (Cir. Ct. Cal., 1894); Re Grand Jury, Id. 840 (Cir. Ct. Cal., 1894); Thomas v. Cincinnati, N. O. & T. P. Ry. Co., 62 Fed. Rep. 803, 823 (Cir. Ct. Ohio, 1894).

[2] Thus, it is said in Pollock on Torts, p. 184, that any act fitted to have the effect of putting "a reasonable man" "in present fear of violence" "may be an assault, though there is no real present ability to do the harm threatened." In 1 Hawkins' Pleas of the Crown,

acts in disturbing business and social relations, is so obvious that little need be said by way of justification of thus extending the scope of such illegal acts. But if we formulate our doctrine thus: that *acts producing a reasonable fear of violence to person or property are illegal*, we find so general a rule to be frequently of great difficulty of application, in view of the infinite variety of circumstances of time and place to which it is capable of being applied.[1] The acts of

110, are instanced "striking at him with or without a weapon; or presenting a gun at him at such a distance to which the gun will carry; or pointing a pitchfork at him, standing within the reach of it; or by holding up one's fist at him; or by any other such like act, done in an angry, threatening manner." This doctrine has frequently been applied in declaring unlawful acts of striking employees producing a fear of injury to person or property. Thus, it is said in State v. Stewart, 59 Vt. 273, 289; s. c., 9 Atl. Rep. 559 (1887): "The anathemas of a secret organization of men combined for the purpose of controlling the industry of others, by a species of intimidation that works upon the mind, rather than the body, are quite as dangerous, and generally altogether more effective, than acts of actual violence." A rather extreme view was taken in Coons v. Chrystie, N. Y. Law Jour., July 21, 1898 (Supm. Ct., Sp. T.), where an injunction against "calling out" employees was granted in a case where there was no evidence of violence, or threat of violence, save as might be inferred from the mere act of calling out. The court say: "If, at the mere nod or word of the latter, the plaintiff's workmen were led immediately to abandon employment which they had been well content to accept, and which, but for the walking delegates' appearance upon the scene, they were just as content to retain, the inference is irresistible that they were coerced by the anticipation of some recognized penalty, and the absence of threats at the moment would signify merely that threats were gratuitous and unnecessary." For other instances, see § 15.

[1] Thus, it is said in Snow v. Wheeler, 113 Mass. 179 (1879), that "it is not easy to give a definition which shall include every form of such coercion." In Barr v. Essex Trades Council, 53 N. J. Eq. 101, 122; s. c., 30 Atl. Rep. 881 (1894), it is said that the fear "need not be abject, but only such as to overcome his judgment or induce him not to do, or to do, that which otherwise he would have done or have left undone." So in Cœur D'Alene Consolidated & Mining Co. v. Miners' Union, 51 Fed. Rep. 260, 267 (Cir. Ct. Idaho, 1892), it is said: "What constitute such actionable threats or intimidations must be determined in each case from all the circumstances attending it. If the things done or the words spoken are such that they will excite fear, or a reasonable ap-

a child might have no influence in producing reasonable fear in a strong man; while the same acts done by the man might produce reasonable fear in the child. The demonstration of a single individual might have no influence in producing such reasonable fear, while the same demonstration by a combination might have such influence.[1] It is indeed the cir-

prehension of damages, and so influence those for whom designed, as to prevent them from freely doing what they desire and the law permits, they may be restrained, and the courts will look beyond the mere letter of the act or word into its spirit and intent."

[1] The following are cases that seem sustainable on the ground that the acts held unlawful produced fear of violence upon the minds of persons seeking trade or employment. It may be, however, that some of these cases are more properly referable to the class of cases considered in § 15; that is to say, are cases, not of fear of violence, but of fear of injury produced by the announcement of an intention to do a lawful act. Sometimes from the facts as reported it is difficult to determine as between these two classes to which a given case belongs. See comments on Old Dominion Steamship Co. v. McKenna, below. In Sherry v. Perkins, 147 Mass. 212; s. c., 17 N. E. Rep. 307 (1888), an injunction was granted against displaying banners with devices (such, for example, as "Lasters are requested to keep away from S.") as a means of threats and intimidation to prevent persons from entering into or continuing in the employment of the plaintiffs, as being illegal at common law and by statute. In Re Wabash R. Co., 24 Fed. Rep. 217 (Cir. Ct. Mo., 1885), it was held illegal to send to employees of a railroad the following notice signed "Chairman:" "You are requested to stay away from the shop until the present difficulty is settled. Your compliance with this will command the protection of the Wabash employees. But in no case are you to consider this an interference." See United States v. Kane, 23 Fed. Rep. 748 (Cir. Ct. Colo., 1885). In Wick China Co. v. Brown, 164 Pa. St. 449; s. c., 30 Atl. Rep. 261 (1894), an injunction was issued against striking employees who conspired to prevent the plaintiff from employing workmen other than those suggested by the defendants, and endeavored to accomplish their purpose "by threats, menaces, intimidations, and opprobious epithets addressed to plaintiff company's officers and workmen, and by gathering in crowds about the company's place of business and at the boarding places of their workmen, and by following said workmen to and from their work, stopping them on the highways, interfering with them in their work, and by holding them up to ridicule and contempt of bystanders." Very similar was Murdock v. Walker, 152 Pa. St. 595, 596; s. c., 25 Atl. Rep. 492 (1893). See also Newman

cumstance that strikes and boycotts are ordinarily the acts of considerable combinations of persons, that has given such frequent opportunity for the application of the doctrine here considered to the acts accompanying strikes and boycotts.

v. Commonwealth, 5 Centr. Rep. 497 (Supm. Ct. Pa., 1886). In Mackall v. Ratchford, 82 Fed. Rep. 41 (Cir. Ct. W. Va., 1897), an injunction against menaces, threats or intimidation by striking miners, to prevent the employees of the mines from going to or from the same, or from engaging in their usual business of mining, was held violated by their marching in a body over two hundred strong in the early hours of the morning before daylight, halting in front of the mine opening, and taking position on each side of the public highway for a distance of at least a quarter of a mile, at the exact places where the miners were in the habit of crossing that highway for the purpose of going from their homes to their work. In Brace v. Evans, 3 Ry. & Corp. L. J. 561 (Allegheny Co., Pa., Com. Pl., 1888), an injunction was granted against a boycott instituted by persons not in the plaintiffs' employ, by reason of the failure of the plaintiffs to reinstate certain persons in employment as demanded. Among the acts complained of were: the issue of circulars requesting all persons to cease patronizing them, some of such circulars having printed in large letters, "Boycott Brace Bros.;" visiting their customers; inducing them to refrain from patronizing them; conspicuously displaying sign with words "Headquarters Brace Bros.' Boycott Committee;" following their wagons, with banners having the words "Boycott Brace Bros.;" requesting their agents to cease dealing with them, and boycotting them on their refusal; distributing circulars and thereby collecting noisy crowds in front of their place of business. See as to use of word "boycott" as involving idea of violence, § 9. In Cook v. Dolan, 19 Pa. Co. Ct. 401, 408 (1897), acts of striking miners thus characterized were held to be coercion: "It certainly cannot be claimed that calling a working miner a 'scab,' a 'blackleg,' a 'black-sheep,' a 'blackleg s—— b——,' and threatening him that if he did not come out now that armed men would be sent for, and threatening that personal violence, 'knocking off his ears,' would be resorted to if he went to work, is legitimate persuasion." So of the conduct of "three or four hundred men marching under the plaintiffs' (employers') tramway, and close to their pit mouth, and miners' houses, all armed with a walking stick, singing 'We'll hang "blacklegs" on a sour apple tree.'"

In People v. Wilzig, 4 N. Y. Crim. R. 403, 414 (N. Y. Co. Oyer & Terminer, 1886), the following action on the part of employees was declared by Barrett, J., in charging the jury, unlawful, as designed to injure the employer's business: "Parading up and down

While the doctrine seems originally to have applied only to fear of personal injury, it is generally regarded as equally applicable to fear of injury to property. Recently the idea has gained currency that it also applies to fear of injury

in front of his (the employer's) door, placarding themselves with the word 'boycott,' advising the passers-by not to patronize the establishment, distributing printed circulars filled with accusation and justifying the so-called 'boycott,' and other devices and methods calculated to induce the public to keep away from the alleged wrong-doer." As to meaning of "intimidation" it is here said: "The defendant's counsel seem to have the idea that if a body of men, however large, operating in the manner suggested, only avoid acts of physical violence, they are within the law; and that the employer's business may be ruined with impunity, so long as no blow is struck, nor actual threat by word of mouth uttered. This is an error. The men who walk up and down in front of a man's shop may be guilty of intimidation, though they never raise a finger or utter a word. Their attitude may nevertheless be that of menace. They may intimidate by their numbers, their methods, their placards, their circulars and their devices." So in People v. Kostka, 4 N. Y. Crim. R. 429, 437 (N. Y. Co. Oyer & Terminer, 1886), the following action was declared by Barrett, J., in charging the jury, unlawful as designed to injure the business of another: "Congregating in numbers near the doors of the person to be injured, printing circulars descriptive of the supposed grievances in more or less emphatic language, and distributing such circulars near and about his doors to his customers and to passers-by." See as to what constitutes "force or violence," or a "threat to use force or violence," under the Utah statute, People v. O'Loughlin, 3 Utah, 133; s. c., 1 Pac. Rep. 653 (1882). In Reg. v. Druitt, 10 Cox C. C. 592, 602 (1867), it was stated by Bramwell, B., in charging the jury, that if the system of "picketing," "though not carried beyond watching and observation, was still so serious a molestation and obstruction as to have *an effect upon the minds* of the working people," it was a punishable offense. Compare Reg. v. Shepherd, 11 Id. 325 (1869). In Reg. v. Hibbert, 13 Id. 82 (1875), it was stated by Cleasby, B., in charging the jury, that "picketing, that is, the watching and speaking to the workmen as they come and go from their employment, to induce them to leave their service, is not necessarily unlawful; nor is it unlawful to use terms of persuasion towards them to accomplish that object; but if the watching and besetting is carried on to such a length and to such an extent that it occasions *a dread of loss*, it would be unlawful." As to "watching" and "besetting" under English statute, see Reg. v. Bauld, Id. 282 (1876). With Reg. v. Hibbert compare Rogers v. Evarts, 17

to *business*. But, in accordance with what we have elsewhere seen, a *fear* of injury to business has, no more than an *injury* to business, any independent existence.[1] Assuming, as we must, that an act of violence to person or property, preventing such person from carrying out his intention to deal with another person, creates a civil liability, to whom is the wrong-doer liable? Clearly he is to the party injured in person or property; but is he also liable to the person with whom the injured party intended to deal? It seems to have been generally assumed, though without consideration, that he is.[2] But if we assume that an injury to busi-

N. Y. Suppl. 264 (Supm. Ct., Sp. T., 1891), where an injunction to restrain strikers from inducing other employees to leave their employment was refused, "picketing," under the circumstances of the case, being held not unlawful, the pickets employing merely persuasion and entreaty, but not violence, threats or intimidation. And held not unlawful to post the names of those contributing and those not contributing funds for the support of the strike. So in Perkins v. Rogg, 28 Weekly L. Bull. 32 (Cinn. Super. Ct., 1892), "picketing," for the purpose of reporting the number of men employed, was held not unlawful. In Old Dominion Steamship Co. v. McKenna, 30 Fed. Rep. 48 (Cir. Ct. N. Y., 1887), an action was held maintainable for a boycott of the plaintiff's business by sending notices to his customers, designed to intimidate them from dealing with it, by threat of *loss and expense*, whereby various persons were so intimidated into refusing to deal with the plaintiff. Such acts were said to be not merely actionable, but misdemeanors at common law and under N. Y. Penal Code, § 168. This illustrates a class of cases above referred to, it being difficult to determine whether the threat of "loss and expense" produced a fear of *violence* or merely of loss of custom. If of violence, the case was probably rightly decided; if merely of loss of custom, in our view, wrongly. See § 15.

[1] See § 1.

[2] See, for instance, cases considered in note 1, p. 64, above. Even in Allen v. Flood, L. R. App. Cas. (1898), 1, where the unsoundness of the doctrine of independent injury to business, was so learnedly and, in our view, so unanswerably shown, the court were clearly of the view that a liability exists in the case supposed. Thus, Lord Herschell recognizes the authority of Tarleton v. McGawley, Peake N. P. 205 (1793), where intending customers were frightened away by an act of violence resulting in the death of one of them, and the party with whom they intended to deal, was held to have a right of action. See also remarks of Lord Davey

ness has no independent existence, as distinct from an injury to person or property, there would seem to be, on principle, serious objection to sustaining in such case a liability in favor of one person, merely because another person failed, even though as a result of violence, to carry out his intention to deal with him.

§ 15. Legality of threats or announcements of intention to do injury.— In the application of the rule just considered, namely, that *acts producing a reasonable fear of violence to person or property are illegal*, the courts have frequently overlooked the distinction between acts producing a fear of *unlawful* injury, and acts producing a fear of *lawful* injury. As an act producing a reasonable fear of *unlawful* injury is itself unlawful, so there is nothing necessarily unlawful in an act producing a fear of *lawful* injury. Such act may be the announcement of an intention to do the injury. To illustrate: The proprietor of a business establishment employing many workmen, desires to discontinue business and close his establishment. It will not be pretended that there is anything unlawful in his so discontinuing business, though great injury may result to the employees in the form of loss of employment. And is it not equally clear that his announcement of his *intention* to discontinue business and close his establishment, is equally lawful, though producing the fear of great injury, that is, of loss of employment? But, clear as is the distinction when thus stated and illustrated, the appreciation of it has been much obscured by the ambiguity of the word "threat," as used in

(p. 178). But assuming the absence of injury or *fear of injury* to the person or property of such person, and assuming, according to the doctrine of Allen v. Flood, that there is no injury to business that the law recognizes as distinct from injury to person or property, what difference does it make — so far as concerns the rights of the person with whom the party actually injured in person or property intended to deal — whether the intention was frustrated by violence or by mere change of intention? We submit this question in the hope that future decisions will furnish a satisfactory answer. See discussion by J. H. Wigmore in 21 Am. Law Rev. 510, 520 (1887).

statutes, pleadings and judicial decisions. Clearly the word applies to an announcement of an intention to do an unlawful injury. Whether it shall be regarded as also applying to an announcement of an intention to do a lawful injury, is a mere question of the use of language. But the important point to notice is, that an announcement of an intention to do a lawful act, is not made unlawful merely by calling it a "threat."[1] And indeed, until recently at least, it seems to

[1] Thus, it is said in Payne v. Western & Atlantic R. R. Co., 13 Lea (Tenn.), 507, 521 (1884): "In law a threat is a declaration of an intention or determination to injure another by the commission of some *unlawful* act; and an intimidation is the act of making one timid or fearful by such declaration. If the act intended to be done is *not unlawful*, then the declaration is not a threat in law, and the effect thereof is not intimidation in a legal sense." So it is said by Lord Herschell in Allen v. Flood, L. R. App. Cas. (1898), 1, 129 (and compare remarks of Lord Shand, p. 165): "The terms 'threat,' 'coercion,' and even 'intimidation,' are often applied in popular language to utterances which are quite lawful, and which give rise to no liability either civil or criminal. They mean no more than this: that the so-called threat puts pressure, and perhaps extreme pressure, on the person to whom it is addressed, to take a particular course. . . . Everything depends on the nature of the representation or statement by which the pressure was exercised. The law cannot regard the act differently because you choose to call it a threat or coercion instead of an intimation or warning." In the dissenting opinion of Holmes, J., in Vegelahn v. Guntner, 167 Mass. 92, 107; s. c., 44 N. E. Rep. 1077 (1896), it is said: "The word 'threats' often is used as if, when it appeared that threats had been made, it appeared that unlawful conduct had begun. But it depends on what you threaten. As a general rule, even if subject to some exceptions, what you may do in a certain event you may threaten to do, that is, give warning of your intention to do in that event, and thus allow the other person the chance of avoiding the consequences. So as to 'compulsion,' it depends on how you 'compel.' So as to 'annoyance,' or 'intimidation.'" See also dissenting opinion of Caldwell, J., in Hopkins v. Oxley Stave Co., 49 U. S. App. 709, 727, 745; s. c., 83 Fed. Rep. 912, 924, 935 (8th Cir., 1897); and on the general subject, article by J. H. Wigmore in 21 Am. Law Rev. 509, 529 (1887). The following seem to be cases where the use of the word "threat" or "threaten" in a statute has misled courts into applying it to the announcement of an intention to do a *lawful* act. See State v. Stewart, 59 Vt. 273, 291; s. c., 9 Atl. Rep. 559 (1887), where, in case of an indictment under a statute

have been a well settled rule that there is nothing unlawful in an announcement of intention (or, if you please, a *threat*) to do what one has a perfect right to do; in other words, what it is lawful to do.[1] Nor does there seem to be, on principle, any ground for refusing to apply this rule to acts accompanying strikes or boycotts. The rule, with this special application, thus becomes: *Though by way of incident to a strike or a boycott, it is not unlawful to announce one's intention (or threaten) to do a lawful act, though such announcement of intention (or threat) produce injury or a fear of injury.*[2] It would seem hardly worth the while to devote

prescribing punishment for using threats or intimidation to prevent a person from accepting or continuing employment in a mill, etc., it was held unnecessary to set out specifically the kind of threats or intimidations made use of. The court follow Queen v. Rowlands, 17 Q. B. 671 (1851). See State v. Glidden, 55 Conn. 46, 69; s. c., 8 Atl. Rep. 890 (1887), as to Connecticut statute making it a punishable offense to "threaten or use any means to intimidate any person, to compel such person, against his will, to do or abstain from doing any act which such person has a legal right to do, or persistently follow such person in a disorderly manner, or injure or threaten to injure his property, with intent to intimidate him." See Farmers' Loan & Trust Co. v. Northern Pacific R. R. Co., 60 Fed. Rep. 803, 817 (Cir. Ct. Wis., 1894), as to Wisconsin statute making it a punishable offense to "by threats, intimidation, force, or coercion of any kind, hinder or prevent any other person from engaging in or continuing in any lawful work or employment, either for himself or as a wage-worker." For other similar statutes see Appendix.

[1] Thus, it was said in Hackley v. Headley, 45 Mich. 569, 576 (1881), by Cooley, J., in a well considered opinion: "Where the party threatens nothing which he has not a legal right to perform, there is no duress." S. P., Fuller v. Roberts, 35 Fla. 110, 117; s. c., 17 So. Rep. 359 (1895). See cases cited in 6 Am. & Eng. Enc. of Law, p. 71, under article "Duress."

[2] The following decisions we regard as sound, as supporting the rule stated in the text. In Payne v. Western & Atlantic R. R. Co., 13 Lea (Tenn.), 507, 521 (1884), an action by a merchant against a railroad company, for notifying its employees that it would discharge them if they traded with the plaintiff, was held not to lie, notwithstanding allegations of threats and intimidation. In Bohn Manuf. Co. v. Hollis, 54 Minn. 223; s. c., 55 N. W. Rep. 1119 (1893), was sustained an agreement contained in the by-laws of an association of retail dealers, not to deal with a whole-

so much space to the enunciation of so obvious and fundamental a doctrine, were it not that the present tendency of judicial decisions in this country seems to be to establish, as

sale dealer dealing directly with customers not dealers, at a point where a member of the association might be doing business. Here the existence of such by-law may be regarded as an announcement of intention. So held, notwithstanding a demand by the association, in accordance with its by-laws, for a percentage on sales made. So the by-law was declared not to operate as coercion upon the members of the association. Compare Jackson v. Stanfield, 137 Ind. 592; s. c., 36 N. E. Rep. 345 (1894), p. 76, below. Bohn Manuf. Co. v. Hollis was followed in Macauley v. Tierney, 19 R. I. 255; s. c., 33 Atl. Rep. 1 (1895), as applicable to a similar agreement contained in resolutions adopted by an association of master plumbers, it being held not illegal for them to send notices to dealers not to sell to plumbers not members of the association, under penalty of withdrawal of patronage. Bohn Manuf. Co. v. Hollis was also applied in Cote v. Murphy, 159 Pa. St. 420, 431; s. c., 28 Atl. Rep. 190 (1894), sustaining an agreement among employers not to sell to persons who had conceded demands of striking employees; also to dissuade others from dealing with him. See also Buchanan v. Kerr, 159 Pa. St. 433; s. c., 28 Atl. Rep. 195 (1894). The rule was well illustrated in Longshore Printing Co. v. Howell, 26 Oreg. 527, 544; s. c., 38 Pac. Rep. 547 (1894), where the Oregon statute making it a misdemeanor to "by force, *threats or intimidation*, prevent or endeavor to prevent any person employed by another, from continuing or performing his work, or from accepting any new work or employment," was held to have no application to a case of officers of a labor union entering upon an employer's premises, and ordering members of the union then at work under contract with it, to cease work "under penalty of being dealt with according to the laws and regulations of said union," or to a resolution of such union ordering all union men working for such employer to cease working for it. The court say (p. 546): "No intimidation is specifically alleged or shown, unless it can be inferred that, by a refusal to quit, the members of the union would subject themselves to the charge of insubordination to the order, and it does not appear that there was sufficient odium attached to this, to put the members in fear, or that compliance with the order and resolution was induced thereby." So held, notwithstanding allegations in the complaint here held bad on demurrer, that by the first order the employees "were intimidated and influenced and without delay immediately obeyed;" that, "being intimidated," they obeyed the second order, and "ceased to fulfill their contracts with plaintiff." Furthermore, the rules of the union provided for suspension or expul-

especially applicable to acts accompanying strikes and boycotts, a doctrine directly opposed to it. Such tendency has, however, been recently abruptly checked in England.[1]

sion for failure to comply with such an order. So, too, statutes making it a misdemeanor to "wilfully and wrongfully commit any act which grossly injures the property of another," or to "either verbally, or by any written or printed communication, threaten any injury to the person or property of another . . . with intent thereby to extort any pecuniary advantage or property from such other, or with intent to compel such other to do any act against his will," were held to have no application. So in Commonwealth v. Sheriff, 15 Phila. (Pa.) 393 (1881), the prohibition of the Pennsylvania statute of 1876 against hindering persons from laboring, by "the use of force, threat, or menace of harm to persons or property," was held not to cover the case of persons who, in behalf of a labor organization, demanded of employers an increase of wages of certain employees, and notified them that a refusal would result in a strike of themselves, followed by notifying such employees that a strike was ordered. Compare with People v. Barondess, note 1, below. By the English Conspiracy and Protection of Property Act of 1875, it is forbidden to "wrongfully and without legal authority" do any of certain specified acts, "with a view to compel any other person to abstain from doing or to do any act which such other person has a legal right to do or abstain from doing." One such class is "using violence to, or *intimidating*, such other person or his wife or children, or injuring his property." Held in Gibson v. Lawson, 2 L. R. Q. B. (1891), 557, not to apply to the action of a member of a labor union, in announcing to the complainant's employer that the union had resolved to strike unless the complainant joined the union. There was no violence or threat of violence to his person or property, but merely fear of loss of employment, produced by the action of the union. It seems that "intimidation," as the word is here used, is limited to "such intimidation as implies a threat of personal violence." See also Curran v. Treleaven, Id. 560. Compare Judge v. Bennett, 36 Weekly Rep. 103 (1887). Under a former statute, "threats or intimidation" had been held to cover the case of announcement of intention to leave employment in a body. Walsby v. Anley, 3 El. & El. 516 (1861). See Skinner v. Kitch, 2 L. R. Q. B. 393 (1867).

[1] The following are illustrations: In People v. Barondess, 133 N. Y. 649; s. c., 31 N. E. Rep. 240 (1892), adopting opinion of Daniels, J., in 61 Hun, 571, 581 (1891), it was held a "threat to do an unlawful injury to property," to "threaten" to prevent persons who had been on strike from returning to their employment. What the defendant actually told the employer was that he would have to pay him a certain sum "to have his peo-

§ 16. Remedies; injunction.— Generally speaking, for any of the injuries thus far discussed, an action at law for damages is an available remedy,[1] though sometimes, as in

ple back again to work;" that if he did not pay it "he could not have his people back again to work." This was a decision by four judges against three, reversing a decision made by two judges against one. The dissenting opinion of Gray, J., reported in 45 N. Y. State Reporter, 248, furnishes the better reason. In Curran v. Galen, 152 N. Y. 33; s. c., 46 N. E. Rep. 297 (1897), an action was sustained against members of a labor union, for conspiring to injure the plaintiff by taking away his means of earning a livelihood, and preventing him from obtaining employment, by threatening to procure his discharge, and prevent him from obtaining employment elsewhere, unless he joined the union; it being held no defense that their action was in pursuance of an agreement between the union and an association of employers, whereby all employees of such employers should be members of such union, no employee to work for more than four weeks without becoming a member. Held illegal, as "a plan of compelling workingmen not in affiliation with the organization to join it, at the peril of being deprived of their employment and of the means of making a livelihood." Compare People ex rel. Gill v. Smith, 5 N. Y. Crim. R. 509 (N. Y. Co. Oyer & Terminer, 1887), and N. Y. Penal Code, § 168, subd. 5, forbidding the use of force, threats or intimidation "to prevent another from exercising a lawful trade or calling." Curran v. Galen would seem in essence to be merely the case of a request to comply with an agreement for exclusive employment of persons of a specified class. As admitted by the demurrer, there was no "intent or purpose to injure plaintiff in any way," nor does it appear that, otherwise than as above stated, any unlawful means were employed to effect the object. Though not so distinctly stated, the existence of the *combination* seems to have largely influenced the decision. It was also intimated that there was a violation of the constitutional guaranty of the right freely to pursue a lawful avocation and of freedom in the pursuit of happiness. See also Consolidated Steel & Wire Co. v. Murray, 80 Fed. Rep. 811, 823 (Cir. Ct. Ohio, 1897). In Barr v. Essex Trades Council, 53 N. J. Eq. 101, 122; s. c., 30 Atl. Rep. 881 (1894), the injury complained of was inducing persons to refuse to deal with the complainant. So far as the establishment of the cause of action is concerned, it seems irrelevant, as alleged, that his customers and employees were intimidated. They were not before the court as complainants. But, waiving this point, we submit that there was no intimidation; *at the utmost there*

[1] See in 34 Am. Law Reg. & Rev. 102 (1895), an article by S. B. Stanton, on "Mandamus as a Means of Settling Strikes."

case of murder, robbery or violent assault, the remedy by indictment exists, either concurrently or exclusively. So, too, in case of conspiracy.[1] But a detailed discussion of the

was injury or fear of injury resulting from the doing of lawful acts or the threat or announcement of intention to do lawful acts. As to his employees, members of labor unions, the "threat" was at most merely to enforce against them the rules of the union, if they should continue to patronize the plaintiff, and it was not contended that such rules were illegal, nor was such enforcement illegal, even if these results were as thus described: "A member of a labor organization who does not submit to the edict of his union, asserts his independence of judgment and action at the risk, if not the absolute sacrifice, of all association with his fellow-members. They will not eat, drink, live or work in his company. Branded by the peculiarly offensive epithets adopted, he must exist ostracised, socially and industrially, so far as his former associates are concerned. Freedom of will, under such circumstances, cannot be expected." Compare Temperton v. Russell, 1 L. R. Q. B. (1893), 715 (p. 75, below). So, as to the customers, the "threat" was merely to refuse to deal with them; nor does the application of the rule seem affected by the mere extent of the organization concerned in the boycott, representing a purchasing power of $400,000 a week. The same general observations apply also to Casey v. Cincinnati Typographical Union, 45 Fed. Rep. 135 (Cir. Ct. Ohio, 1891), a case very similar on the facts.

In Vegelahn v. Guntner, 167 Mass. 92; s. c., 44 N. E. Rep. 1077 (1896), was enjoined the maintenance of a patrol in front of the plaintiff's place of business, for the purpose of inducing persons to leave or refrain from entering his employment, under the conditions thus stated (p. 97): "Following upon a strike of the plaintiff's workmen, the defendants conspired to prevent him from getting workmen, and thereby to prevent him from carrying on his business, unless and until he should adopt a certain schedule of prices. The means adopted were persuasion and social pressure, threats of personal injury or unlawful harm conveyed to persons employed or seeking employment, and a patrol of two men in front of the plaintiff's factory, maintained from 6:30 A. M. until 5:30 P. M., on one of the busiest streets of Boston. The number of men was greater at times, and at times showed some little disposition to stop the plaintiff's door. The patrol proper at times went further than simple advice, not obtruded beyond the point where the other person was willing to listen, and it was found that the patrol would probably be continued if not enjoined. There was also some evidence of persuasion to break existing contracts." So far as these acts constituted an

[1] See § 8.

application of these remedies belongs to the subject of procedure, and lies beyond the scope of this treatise.[1] The questions of greatest difficulty in this connection are as to the

enticement to leave employment, the decision might be sustained under the doctrine considered in § 10. There were dissenting opinions by Field and Holmes, JJ., the latter of which is especially instructive. See as to reference to Massachusetts and other statutes making it "a criminal offense for one by intimidation or force to prevent or seek to prevent a person from entering into or continuing in the employment of a person or corporation." In Hopkins v. Oxley Stave Co., 49 U. S. App. 709; s. c., 83 Fed. Rep. 912 (8th Cir., 1897), members of labor organizations (lodges of the "Coopers' International Union" and the "Trades Assembly of Kansas City") were enjoined from conspiring to compel a corporation engaged in the manufacture of barrels and casks for packing purposes, to abandon the use of hooping machines, this object to be accomplished by dissuading the customers of the corporation from buying machine-hooped barrels and casks, such customers to be so dissuaded through fear, inspired by concerted action of the two organizations, that the members of all the labor organizations throughout the country, would be induced not to purchase any commodity that might be packed in such machine-hooped barrels or casks. The dissenting opinion of Caldwell, J., though too declamatory in style for a judicial opinion, nevertheless seems to us to furnish by far the better reason, and is rich in suggestion. In Temperton v. Russell, 1 L. R. Q. B. (1893), 715, 726, where an action against members of a joint committee of trades unions, for inducing breaking of a contract with the plaintiff, was sustained, the action of the committee in notifying members of the union to withdraw from the employment of the person with whom the plaintiff had contracted, was declared illegal,

[1] The free application of the remedy of injunction to labor disputes, producing what has been characterized as "government by injunction," has been subjected to fierce criticism, involving a controversy which we consider it needless to here enter upon. Suggestive articles bearing on the subject are those by C. C. Allen on "Injunction and Organized Labor," in 28 Am. Law Rev. 828; 50 Alb. Law Jour. 140 (1894); by F. J. Stimson, on "The Modern Use of Injunctions, in 10 Pol. Sci. Quart. 189 (1895); by W. H. Dunbar, on "Government by Injunction," in 13 Law Quart. Rev. 347 (1897); by C. N. Gregory, on "Government by Injunction," in 11 Harv. Law Rev. 487 (1898). For a vigorous statement of objections arising under constitutional provisions securing the right of trial by jury, see dissenting opinion of Caldwell, J., in Hopkins v. Oxley Stave Co., 49 U. S. App. 709, 729; s. c., 83 Fed. Rep. 912, 925 (8th Cir., 1897).

availability of the remedy by injunction in particular cases. The circumstance that the injuries in question are frequently the acts of considerable numbers of persons, and cover a

though, as we have intimated with regard to similar cases, the point was not in the case. The court say: "These men had bound themselves to obey; and they knew that they had done so, and that if they did not obey, they would be fined or expelled from the union to which they belonged." But it may be said of this case, as of Barr v. Essex Trades Council, p. 74, above, that this was merely the enforcing against such men, of a contract that, so far as appears, was legal and voluntarily entered into. So in the following cases, notwithstanding the bewildering verbiage concerning "conspiracy," "threats," "coercion," and the like, the action declared unlawful was merely that of employees in announcing their intention to induce persons not to deal with their employers or their customers, and it does not appear that there was any injury or threat of injury to person or property. Crump v. Commonwealth, 84 Va. 927, 940; s. c., 6 S. E. Rep. 620 (1888; see opinion of court below in 11 Va. Law Jour. 324); State v. Glidden, 55 Conn. 46, 69; s. c., 8 Atl. Rep. 890 (1887). Compare Old Dominion Steamship Co. v. McKenna, 30 Fed. Rep. 48 (Cir. Ct. N. Y., 1887). However it may have been as to the evidence, the court in Crump v. Commonwealth were, in our view, clearly in error in refusing to charge as requested, for instance, that if "the alleged conspirators confined themselves to merely announcing to the patrons of B. Bros. (the employers) that they had stopped dealing with that firm, and would not deal with the patrons of said firm, and would get their friends to agree with them in their course," then the prisoner was not guilty. In Jackson v. Stanfield, 137 Ind. 592; s. c., 36 N. E. Rep. 345 (1894), the facts were substantially the same as in Bohn Manuf. Co. v. Hollis, 54 Minn. 223; s. c., 55 N. W. Rep. 1119 (1893) (see p. 70, above), but a contrary result was reached, and the by-law held to operate as unlawful "coercion" upon the wholesale dealers, the court disapproving Bohn Manuf. Co. v. Hollis. Compare People v. Duke, 19 Misc. 292; s. c., 44 N. Y. Suppl. 336 (N. Y. Co. General Sessions, 1897). In Jackson v. Stanfield there is a *dictum* that the by-law operated as coercion upon the members of the association. In Perkins v. Pendleton, 90 Me. 166; s. c., 38 Atl. Rep. 96 (1897), an action for inducing a discharge from employment was sustained on allegations of "wilfully *threatening*, persuading, inducing and, by other overt acts, *compelling*" the employer, "against its will and without any desire on its part so to do, to discharge the said plaintiff from its employ." As urged by counsel, there was no allegation of "any threat of *injury*" or use of intimidation or force.

considerable extent of territory, besides being frequently repeated, has within a comparatively recent period[1] led to the extensive use of injunctions in the case of strikes and boycotts, and acts accompanying the same.[2] The rules ap-

[1] Thus, in Consolidated Steel & Wire Co. v. Murray, 80 Fed. Rep. 811, 827 (Cir. Ct. Ohio, 1897), it is said, citing Stimson's hand-book of the "Labor Law of the United States," that the remedy by injunction, as applied to labor disputes, is traced back to Springhead Spinning Co. v. Riley, 6 L. R. Eq. Cas. 551 (1868). And in so recent a decision as Mayer v. Journeymen Stonecutters' Assoc., 47 N. J. Eq. 519, 527; s. c., 20 Atl. Rep. 492 (1890), it is said with reference to "the effort to control employment and wages, by labor organizations," that "the industry, research and learning of the distinguished counsel of the complainants has furnished but one reported case where a court of equity has interfered to prevent or control the action of such organizations. All of the reported cases save three, referred to by counsel, were proceedings of a criminal nature, either by information or indictment." Bearing in mind that the word "boycott" was not used in any American decision prior to 1887 (see § 9, p. 42, above), there seems to be but a limited scope for the application of the following statement in Casey v. Cincinnati Typographical Union, 45 Fed. Rep. 135, 143 (Cir. Ct. Ohio, 1891): "No case has been cited where, upon a proper showing of facts, an unsuccessful appeal has been made to a court of chancery to restrain a boycott."

[2] It being as a rule lawful, apart from contractual relations, to *quit* one's *employment*, an injunction against so quitting will not be granted. In Reynolds v. Everett, 144 N. Y. 189; s. c., 39 N. E. Rep. 72 (1894), the discretion of the court below was held properly exercised in refusing an injunction in favor of an employer against a strike, in the absence of elements of intimidation, especially as the acts complained of had been discontinued. But, proceeding on the theory of an implied agreement not to quit employment under certain conditions (see § 8), in Toledo, Ann Arbor, etc. Ry. Co. v. Pennsylvania Co., 54 Fed. Rep. 746 (Cir. Ct. Ohio, 1893), an injunction restraining railroad companies and their employees from refusing to extend to another railroad facilities for interchange of freight, was held violated by an engineer in the employ of one of the companies, in quitting his train on a main track ten miles from its destination. This is carrying the remedy to an extreme length, and goes far toward justifying the complaints against "government by injunction." The propriety of an injunction against *inducing to quit employment* has been recognized. Thus, in Toledo, Ann Arbor, etc. Ry. Co. v. Pennsylvania Co., 54 Fed. Rep. 730, 744 (Cir. Ct. Ohio, 1893), though the injunction was granted on the theory that the acts complained of constituted a boycott,

plicable to injunctions generally are applicable here. A question of some difficulty has arisen in connection with the

rather than a strike or a quitting of employment (for facts, see § 12), yet the court say that an injunction might have been granted against "directing the engineers to quit work, for the purpose of coercing the defendant companies to violate the law and complainant's rights." An injunction in this form, however, was not asked for. An injunction against inducing to quit employment was also granted in Coons v. Chrystie, N. Y. Law Jour., July 21, 1898 (Supm. Ct., Sp. T.). So in Vegelahn v. Guntner, 167 Mass. 92; s. c., 44 N. E. Rep. 1077 (1896; for facts, see § 15), the acts enjoined included inducing to quit employment. So injunctions have been granted against *inducing persons not to enter one's employment.* Vegelahn v. Guntner, above; Blindell v. Hagan, 54 Fed. Rep. 40 (Cir. Ct. La., 1893); affirmed in Hagan v. Blindell, 13 U. S. App. 354; s. c., 56 Fed. Rep. 696 (5th Cir., 1893). Compare, under English statute against "watching or besetting," Lyons v. Wilkins, 1 L. R. Ch. (1896), 811 (and see § 14).

So against *boycotts*, or *inducing a refusal to deal* (or threats thereof). Brace v. Evans, 3 Ry. & Corp. L. J. 561 (Allegheny Co., Pa., Com. Pl., 1888; for facts, see § 14); Hopkins v. Oxley Stave Co., 49 U. S. App. 709; s. c., 83 Fed. Rep. 912 (8th Cir., 1897; for facts, see § 15; applying the rule that, where the cause of action arises *ex delicto*, the injured party may sue either one or more of the joint wrong-doers); Toledo, Ann Arbor, etc. Ry. Co. v. Pennsylvania Co., 54 Fed. Rep. 730, 744 (Cir. Ct. Ohio, 1893), above. In the case last cited the court say: "The interstate business of complainant will be interrupted and interfered with at every hour of the day and at every point within a radius of many miles." The case against the party seeking to enforce the rule, was strengthened by the fact that, at the time he issued or was about to issue his order, the injunction under consideration in 54 Fed. Rep. 746 (see above), had issued. A notable decision under this head is Barr v. Essex Trades Council, 53 N. J. Eq. 101, 127; s. c., 30 Atl. Rep. 881 (1894), where an injunction was allowed against the boycott of a daily newspaper by an extensive combination of labor unions. The court say: "Representations calculated to reduce the paper's circulation with the public, or to influence, by fear of loss of customers, the number or extent of advertisements, operate, not once for all, but, as it were, day by day, as the paper goes to and comes from the press, and each loss will be a distinctive cause of action. . . . When opposition through the agency of already-established organizations, reaching in their locality every part of the county, and in their membership almost every industry in prominent operation, comprising, in the territory in which the paper must look for its support, operatives of a purchasing power of $400,000 a week, is put on

application of this remedy to injuries consisting of the mere use of words, whether spoken or written. It is obvious that such use of words may do great injury, so as to be action-

foot,— when such an organization, not satisfied with its potential authority over its own members, appeals to the public to boycott the paper, to cease buying or advertising in it, with the significant suggestion that disregard of the appeal will bring upon such person the like opposition of the organizations,— who can estimate or approximate the natural damage short of ruin? The legal remedy in this case thus not only involves multiplicity of suits, but the threatened damage seems irreparable." So the boycott of a newspaper was enjoined under similar conditions in Casey v. Cincinnati Typographical Union, 45 Fed. Rep. 135 (Cir. Ct. Ohio, 1891), it being held no defense that the representations of fact were true. On the other hand, in Longshore Printing Co. v. Howell, 26 Oreg. 527; s. c., 38 Pac. Rep. 547 (1894), an injunction against a boycott by members of trades unions, of the business of "lithographing, engraving, printing and publishing journals, newspapers, etc.," was refused on the ground that there did not appear such threatened and imminent injuries to the plaintiff's business and property, as would result in its irreparable detriment and loss, while conceding that the defendant might be liable in an action at law or criminally. There were allegations of a conspiracy between the officers and members of the union to compel the plaintiff to submit to its dictation, upon pain of being boycotted; of entry on the plaintiff's premises and ordering union men to cease work under penalty of being dealt with according to the regulations of the union; that the plaintiff lost, and apprehended loss of, important business through the wilful and malicious acts of the defendant; of circulation of facts of the plaintiff's employees being called off and ordered to stop work, and the plaintiff's office left without hands, it not being shown how these facts were circulated, or to whom they were communicated; of posting the following notice in conspicuous places: "Owing to the Longshore Printing Company breaking the rules of the Multnomah Typographical Union, all members of the union were withdrawn March 16, 1893." The court say (p. 552): "This may or may not have been detrimental to plaintiff's business, and would depend somewhat upon the state of siege existing at the time." So allegations of "secret assaults" upon the plaintiff, and of its patrons being "harassed" and "boycotted," were held insufficient as unaccompanied with statements of definite facts and circumstances. An injunction against a boycott was refused on the ground that the plaintiff did not come into court with clean hands, in Sinsheimer v. United Garment Workers, 77 Hun (N. Y.), 215; s. c., 28 N. Y. Suppl. 321 (1894; see § 12); but see decision below in

able at law.[1] And the remedy by injunction has been extended beyond mere bodily acts producing injury, to the use of words producing injury. But we are here confronted with the rule, supported by much authority, that an injunc-

5 Misc. 448; s. c., 26 N. Y. Suppl. 152 (1893). It was refused in Sweeny v. Torrence, 11 Pa. Co. Ct. 497 (1892); Manufacturers' Outlet Co. v. Longley, — R. I. —; s. c., 37 Atl. Rep. 585 (1897), on the ground that the acts complained of were *past* acts. See also, as to injunctions against boycotts, Lewin v. Welsbach Light Co., 81 Fed. Rep. 904 (Cir. Ct. Pa., 1897).

In Worthington v. Waring, 157 Mass. 421; s. c., 32 N. E. Rep. 744 (1892), an injunction against the *blacklisting* of employees was refused; but see explanation of the decision in 20 L. R. A. 342, note.

Injunctions have been granted against *the unlawful acts of striking employees* or those acting in sympathy with them. Thus, in Cœur D'Alene Consolidated & Mining Co. v. Miners' Union, 51 Fed. Rep. 260 (Cir. Ct. Idaho, 1892), against labor unions and members thereof, restraining them from entering upon the complainant's mines or from interfering with the working thereof, or by the use of force, threats or intimidations, or by other means, from interfering with or preventing the complainant's employees from working upon its mines. The court say (p. 262): "The evidence justifies the conclusion that defendants are organized into associations wherein submission to stringent and arbitrary rules is required; that, by means approaching dictation, they have attempted to control employers in the selection of laborers and the wages to be paid them, and have discouraged and, as far as they could, prevented those who do not belong to their societies from procuring work; that by force, in one instance, they took complainant's laborers from its mine to their hall, where, upon such laborers so refusing to comply with their demands to join them and abide by their laws, they actually ordered their banishment from the State, and, in a manner deserving the most severe condemnation, enforced their lawless decree, and against men who, by reason of their birth and not through the grace of the government, were entitled to all the rights of American citizenship; that, in such numbers and under such circumstances as were menacing, they have requested non-union men to cease work, and to such have applied in an offensive and threatening manner most opprobious epithets, and in other ways have annoyed and vexed laborers who refused to join their associations." The court say (p. 265): "The threatened acts are such that their frequent occurrence might be expected, and to

[1] See, for instance, Ryan v. Burger, etc. Brewing Co., 13 N. Y. Suppl. 660 (Supm. Ct., Gen. T., 1891).

tion will not be granted against a mere libel. A distinction has been sought to be maintained between an injunction

obtain legal redress therefor the annoyance of a multiplicity of suits would follow; also it is alleged that defendants are insolvent — both of which are among the prime reasons that appeal to a court of equity for its preventive relief." So in Consolidated Steel & Wire Co. v. Murray, 80 Fed. Rep. 811 (Cir. Ct. Ohio, 1897), an injunction was granted against labor unions and members thereof, it appearing that they, for the purpose of compelling the adoption of a particular scale of wages, were guilty of acts of intimidation and violence, assembling near the entrance to the complainant's mill, preventing its employees from going to their work, assaulting and wounding them. Other instances of the granting of injunctions against threats or intimidation by striking employees are: N. Y., Lake Erie & W. R. R. Co. v. Wenger, 17 Weekly L. Bull. 306 (Cuyahoga Co., Ohio, Com. Pl., 1887; there being also present the element of trespassing upon the plaintiff's premises); Perkins v. Rogg, 28 Id. 32 (Cinn. Super. Ct. 1892); Lake Erie & Western Ry. Co. v. Bailey, 61 Fed. Rep. 494 (Cir. Ct. Ind., 1893); Bruschke v. Furniture Makers' Union, 18 Chicago Legal News, 306 (Super. Ct. Cook Co., 1886?). In Arthur v. Oakes, 24 U. S. App. 239, 244; s. c., 63 Fed. Rep. 310, 312 (7th Cir., 1894; for facts, see § 14), the decision was based on the general "power of a court of equity, having custody by receivers of the railroad and other property of a corporation, to enjoin combinations, conspiracies or acts upon the part of the receivers' employees and their associates in labor organizations, which, if not restrained, would do irreparable mischief to such property, and prevent the receivers from discharging the duties imposed by law upon the corporation." So, acts producing fear of violence upon the minds of employees of a railroad in the hands of a receiver, were held an unlawful interference with the management of the road and a contempt of court, in Re Wabash R. Co., 24 Fed. Rep. 217 (Cir. Ct. Mo., 1885); United States v. Kane, 23 Fed. Rep. 748 (Cir. Ct. Colo., 1885). In Re Debs, 158 U. S. 564, 598; s. c., 15 Supm. Ct. Rep. 900 (1895), affirming 64 Fed. Rep. 724, 765 (Cir. Ct. Ill., 1894) (see § 8, p. 35, above), the injunction was sustained on the ground of the right of the government to enjoin interference with interstate commerce.

In Arthur v. Oakes, above; Consolidated Steel & Wire Co. v. Murray, 80 Fed. Rep. 811 (Cir. Ct. Ohio, 1897), above; Vegelahn v. Guntner, 167 Mass. 92; s. c., 44 N. E. Rep. 1077 (1896), was applied the rule that an injunction may be granted against an act that is also punishable as a crime. So in Hamilton-Brown Shoe Co. v. Saxey, 131 Mo. 212; s. c., 32 S. W. Rep. 1106 (1895); Davis v. Zimmerman, 91 Hun, 489; s. c., 36 N. Y. Suppl. 303 (1895), both cases of acts of striking employees. In

against the use of words producing a fear of injury, and an injunction against mere libelous words.[1] But we submit

Perkins v. Rogg, 28 Weekly L. Bull. 32 (Cinn. Super. Ct., 1892), an injunction was granted against a part only of the defendants.

[1] In Springhead Spinning Co. v. Riley, 6 L. R. Eq. Cas. 551 (1868), an injunction was granted to restrain officers of a trade union from printing or publishing placards or advertisements for the purpose of intimidating workmen from entering the service of the plaintiff. So held under a statute, though the acts were declared to be unlawful at common law. So in Sherry v. Perkins, 147 Mass. 212; s. c., 17 N. E. Rep. 307 (1888), against displaying banners with devices, as a means of threats and intimidation, to prevent persons from entering into or continuing in the employment of the plaintiffs. In Cœur D'Alene Consolidated & Mining Co. v. Miners' Union, 51 Fed. Rep. 260, 267 (Cir. Ct. Idaho, 1892), it is said: "A clear distinction will be observed between the two classes of cases above noted. In the one, when the acts complained of consist of such misrepresentations of a business that they tend to its injury, and damage to its proprietor, the offense is simply a libel; and in this country the courts have, with great unanimity, held that they will not interfere by injunction, but that the injured party must rely upon his remedy at law. On the contrary, when the attempt to injure consists of acts or words which will operate to intimidate and prevent the customers of a party from dealing with or laborers from working for him, the courts have, with nearly equal unanimity, interposed by injunction." See further, as illustrating this distinction, Sherry v. Perkins, above; Emack v. Kane, 34 Fed. Rep. 46 (Cir. Ct. Ill., 1888); Casey v. Cincinnati Typographical Union, 45 Fed. Rep. 135 (Cir. Ct. Ohio, 1891. Here the authorities are quite carefully considered). See also Vegelahn v. Guntner, 167 Mass. 92; s. c., 44 N. E. Rep. 1077 (1896); Shoemaker v. South Bend Co., 135 Ind. 471; s. c., 35 N. E. Rep. 280 (1893); Francis v. Flinn, 118 U. S. 385; s. c., 6 Supm. Ct. Rep. 1148 (1886); Arthur v. Oakes, 24 U. S. App. 239, 256; s. c., 63 Fed. Rep. 310, 320 (7th Cir., 1894). For instances of statements held to be mere libels and not furnishing ground for injunctions as against injuries to business, see Mayer v. Journeymen Stonecutters' Assoc., 47 N. J. Eq. 519; s. c., 20 Atl. Rep. 492 (1890). In Richter v. Journeymen Tailors' Union, 24 Weekly L. Bull. 189 (Franklin Co., Ohio, Com. Pl., 1890), a case of the circulation and posting, by members of a labor union, of circulars and posters claimed to contain statements injurious to the plaintiff's business, Sherry v. Perkins, above, was distinguished on the ground that there, in addition to the display of the banner, there was the element of intimidation of the plaintiff's employees. Springhead Spinning Co. v. Riley, 6 L. R. Eq. Cas. 551

that the distinction is scarcely a substantial one. It is easy to see how the rule that an injunction will not be granted against a mere libel, originated under conditions in which a libel was commonly the act of a single individual. But if the doctrine becomes established that an injunction is an available remedy against the use of words producing a fear of injury, it is difficult to see on principle why it should not be an available remedy against such use of words as constitutes a libel, when frequently repeated by large numbers of persons over a considerable extent of territory.[1]

(1868) (see p. 82, above), is said, in Mayer v. Journeymen Stonecutters' Assoc., 47 N. J. Eq. 519; s. c., 20 Atl. Rep. 492 (1890), to have been overruled in Prudential Assurance Co. v. Knott, 10 L. R. Ch. App. 142 (1875).

[1] Thus, in Gilbert v. Mickle, 4 Sandf. Ch. (N. Y.) 357 (1846), the jurisdiction to enjoin the continuous display of a placard containing offensive words was recognized, even on the supposition that the placard was a libel. See also 2 High on Injunctions (3d ed.), § 1015; 1 Jaggard on Torts, p. 353. The illogical character of the distinction is fully demonstrated in an article by W. D. Lewis on "Injunctions to Restrain Libels, and Courts of Criminal Equity," in 31 Am. Law Reg. & Rev. 782 (1892). It seems to be the common practice in England to grant injunctions against libels. Thus, in Trollope v. London Building Trades Federation, 72 L. T. R. 342 (1895), a case of a trade libel. But as to whether this practice is not based on legislation, see above article (p. 792) and Kidd v. Horry, 28 Fed. Rep. 773 (Cir. Ct. Pa., 1886); De Wick v. Dobson, 18 N. Y. App. Div. 399; s. c., 46 N. Y. Suppl. 390 (1897).

PART II.

COMBINATIONS PRODUCING PUBLIC INJURY.

§ 17. The doctrine of public policy.— The wrongs hitherto considered have been wrongs that the law regards as committed merely against an individual. But we pass now to a consideration of wrongs that the law regards as far more extensive in their operation, namely, as committed not merely against an individual, but against a large number of individuals, constituting that vague combination known as "the public," that is to say, the inhabitants of a given town, city, State or country, as the case may be, or even of a region not limited by mere political boundaries. The needs and capacities of different individuals are so infinite in their variety that a wrong measured by the needs and capacities of a large number must, of necessity, be somewhat indeterminate in its character, to say nothing of the indefiniteness of the number affected. Hence, it is not surprising that so indeterminate a test of liability has at times encountered strong disapproval.[1] Nevertheless it is a test that we must regard as, for the present at least, firmly established in our juris-

[1] Such disapproval is manifested in the frequent quotation of the remark of Burrough, J., in Richardson v. Mellish, 2 Bingham, 229, 252 (1824), that "public policy is a very unruly horse." See, for instance, Chappel v. Brockway, 21 Wend. (N. Y.) 157, 164 (1839). For criticisms of the doctrine, see remarks of Campbell, C. J., in Hilton v. Eckersley, 6 El. & Bl. 47, 64 (1855); also Kellogg v. Larkin, 3 Pinney (Wis.), 123, 136 (1851). In Bohn Manuf. Co. v. Hollis, 54 Minn. 223, 231; s. c., 55 N. W. Rep. 1119 (1893), it is said: "There is perhaps danger that, influenced by such terms of illusive meaning as 'monopolies,' 'trusts,' 'boycotts,' 'strikes,' and the like, they (the courts) may be led to transcend the limits of their jurisdiction, and, like the court of King's Bench, in Bagg's Case, 11 Coke, 93*b*, 98*a* (1615), assume that, on general principles, they have authority to correct or

prudence.[1] A wrong of this character is commonly known as an act against *public policy*. Any definition of such an act would seem to be of necessity unsatisfactory,[2] and, without attempting to frame one, we content ourselves with the suggestion that an act illegal as against public pol-

reform everything which they may deem wrong, or, as Lord Ellsmere puts it, 'to manage the State.'"

[1] In Bishop v. Palmer, 146 Mass. 469; s. c., 16 N. E. Rep. 299 (1888), the invalidity of a contract in restraint of trade was said to rest on the same ground "as if such contracts were forbidden by positive statute." That the court will raise the question that a contract is illegal as against public policy, though it has not been raised by the parties, see Wright v. Cudahy, 168 Ill. 86; s. c., 48 N. E. Rep. 39 (1897). But an appellate court should not consider the objection, raised for the first time on appeal, unless such illegality appear from the pleadings, the face of the contract, or the confessed facts of the case. Carter-Crume Co. v. Peurrung, — U. S. App. —; s. c., 86 Fed. Rep. 439 (6th Cir., 1898). The rule that the question whether an agreement is contrary to public policy, is *one of law* for the court has been applied to agreements in restriction upon competition. Thus, in Cummings v. Union Blue Stone Co., 15 N. Y. App. Div. 602; s. c., 44 N. Y. Suppl. 787 (1897; holding a request to go to the jury properly denied). So in Kellogg v. Larkin, 3 Pinney (Wis.), 123, 135 (1851), holding that, in an action on an agreement, judgment for the defendant on demurrer to the plea was not made proper by mere averments in the plea to the effect that the agreement tended to stifle competition, etc. The court say: "No averment could give to the agreement a character which it had not, and no admission could take from it the character which it had." To similar effect, Hoffman v. Brooks, 23 Am. Law Reg. (N. S.) 648 (Super. Ct. Cinn., 1884). But in South Florida R. R. Co. v. Rhodes, 25 Fla. 40, 46; s. c., 5 So. Rep. 633 (1889), the question whether an agreement was "*bona fide* and not entered into for the purpose of an oppressive monopoly" was held a mixed one of law and fact, and for the jury. See, as to pleading defense to contract valid on its face as alleged and proved by the plaintiff, Drake v. Siebold, 81 Hun (N. Y.), 178; s. c., 30 N. Y. Suppl. 697 (1894).

[2] It was said by Kekewich, J., in Davies v. Davies, 36 L. R. Ch. D. 359, 364 (1887), that "public policy does not admit of definition." But in People ex rel. v. Chicago Gas Trust Co., 130 Ill. 268, 294; s. c., 22 N. E. Rep. 798 (1889), public policy is defined as "that principle of the law which holds that no subject or citizen can lawfully do that which has a tendency to be injurious to the public or against the public good." See also Greenhood on Public Policy, p. 2.

icy involves, as an essential element, the idea of a wrong committed against a considerable number of persons, such number being commonly incapable of precise determination. It is important to note that so different are the conditions of existence, comparing one time or country with another, that an act, illegal as against public policy, under the conditions of a given time and country, may not be so under the conditions of another.[1] Hence, in applying this test of liability, precedents based on different conditions of time and place should be employed with great caution.[2] So, too, the lack of precedents furnishes no sufficient ground for refusal to pronounce illegal, acts performed under radically

[1] Thus, it is said in United States v. Trans-Missouri Freight Assoc., 19 U. S. App. 36, 53; s. c., 58 Fed. Rep. 58, 68 (8th Cir., 1893), with reference to public policy in connection with contracts in restraint of trade: "Public policy changes with the changing conditions of the times. It is hardly to be expected that a people who are transported by steam with a rapidity hardly conceived of a century ago, who are in constant and instant communication with each other by electricity, and who carry on the most important commercial transactions by the use of the telegraph, while separated by thousands of miles, will entertain precisely the same views of what is conducive to the public welfare in commercial and business transactions as the people of the last century, who lived when commerce crept slowly along the coasts, shut out of the interior by the absence of roads, and hampered by an almost impassable ocean. . . . It is with the public policy of to-day, as illustrated by public statutes and judicial decisions, that we have now to deal. In considering that subject we are not to be governed by our own views of the interests of the people, or by general considerations tending to show what policy would probably be wise or unwise. Such a standard of determination might be unconsciously varied by the personal views of the judges who constitute the court. The public policy of the nation must be determined by its constitution, laws and judicial decisions. So far as they disclose it, it is our province to learn and enforce it; beyond that it is unnecessary and unwise to pursue our inquiries." See also Davies v. Davies, 36 L. R. Ch. D. 359 (1887).

[2] This is peculiarly applicable to precedents concerning the validity of contracts in restraint of trade. See note 1, above; also, Nordenfelt v. Maxim Nordenfelt Guns & Ammunition Co., L. R. App. Cas. (1894), 535, 553; Diamond Match Co. v. Roeber, 106 N. Y. 473; s. c., 13 N. E. Rep. 419 (1887).

new conditions of time and place.[1] Obviously, the public policy of a given jurisdiction may be determined by the legislative power, subject to constitutional restriction, if any.[2]

§ 18. Nature and definition of monopolies.— Competition, especially among sellers, is so universal as to be commonly regarded as a part of the normal condition of things. Until within a comparatively recent period, absence of competition has usually been the result, not of the acts of mere individuals, but of a grant that is the act of government, conferring upon a single individual or set of individuals the exclusive right of buying or selling a given article within a given area. This exclusive right of selling is known as a *monopoly*.[3] In England the power of creating monopo-

[1] This is peculiarly applicable to the development of the doctrine forbidding monopolies that result from the mere acts of private parties.

[2] People ex rel. v. Chicago Gas Trust Co., 130 Ill. 268, 296; s. c., 22 N. E. Rep. 798 (1889). Thus, in Stewart v. Erie & Western Transp. Co., 17 Minn. 372, 396 (1871), a traffic contract entered into by a railroad corporation, that it was authorized to make, was held not illegal, though resulting in a practical monopoly. See, however, as to grant of exclusive privilege to manufacture and sell gas, City of St. Louis v. St. Louis Gaslight Co., 70 Mo. 69, 119 (1879). In Cameron v. N. Y. & Mt. Vernon Water Co., 62 Hun (N. Y.), 269; s. c., 16 N. Y. Suppl. 757 (1891), it was said: "The consolidation of corporations engaged in the same general line of business is not against public policy. The legislature has permitted it for years and still permits it. There is a great difference between the consolidation of two corporations into one new corporation, and the *combination* between two existing corporations for the prevention of competition. The former is permitted and the latter is condemned. It is not necessary to point out the distinction so far as the public or private good is concerned. It is enough that the legislature has drawn the distinction." Notwithstanding the general rule of public policy condemning restrictions upon competition, patent-rights furnish conspicuous instances of such restrictions expressly legalized by the legislative power. See § 18.

[3] Until recently the accepted definitions of a monopoly have been confined to such as are created by act of government. Thus, it is defined in 4 Blackstone's Commentaries, p. 159, as "a license or privilege allowed *by the king* for the sole buying and selling, making, working or using of anything whatsoever, whereby the subject

lies was for a long time in the crown, but was so abused by the appointing power that, by virtue of statute, it is now solely in Parliament.[1] Similarly in this country the power is in the legislatures,[2] subject to such constitutional restrictions as exist.[3] It is to be noted that the legal conception

in general is restrained from that liberty of manufacturing or trading *which he had before*." So in the dissenting opinion of Story, J., in Charles River Bridge v. Warren Bridge, 11 Peters (U. S.), 420, 607 (1837), citing East India Co. v. Sandys, 10 Howell's State Trials, 371, 386, 425 (1684), as "an institution *by the king*, by his grant, commission or otherwise to any persons or corporations of or for the sole buying, selling, making, working or using of everything, whereby any persons or corporations are sought to be restrained of any freedom or liberty *they had before*, or hindered in their lawful trade." See also Darcy v. Allein, 11 Coke, 84*b* (1602); United States v. E. C. Knight Co., 156 U. S. 1, 9; s. c., 15 Supm. Ct. Rep. 249 (1895).

[1] By 21 Jas. 1, c. 3 (1624), declaring that all monopolies, grants, letters patent, etc., for the "sole buying, selling, making, working or using of anything" should be void. But there had been much earlier legislation directed against monopolies. See 9 Edw. 3, c. 1 (1335), cited in Darcy v. Allein, 11 Coke, 84*b* (1602). As is said by Blackstone (4 Commentaries, p. 159), such monopolies "had been carried to an enormous height during the reign of Queen Elizabeth." For a vivid characterization of the evils leading to the popular agitation in England against monopolies, about the beginning of the seventeenth century, see argument of counsel in the Slaughter-House Cases, below (pp. 45–48), and quotation therein from Macaulay's History of England. Such monopolies had previously to the act of 1624, however, been declared illegal on common-law grounds. See § 19.

[2] Slaughter-House Cases, 16 Wall. 36, 66 (1873); Stewart v. Erie & Western Transp. Co., 17 Minn. 372, 395 (1871); Bancroft v. Thayer, 5 Sawyer, 502 (1879). But legislative grants creating monopolies are construed strictly. See, for instance, Saginaw Gas-Light Co. v. City of Saginaw, 28 Fed. Rep. 529, 535 (Cir. Ct. Mich., 1886); Appeal of Scranton Electric Light & Heat Co., 122 Pa. St. 154; s. c., 15 Atl. Rep. 446 (1888). Sometimes an exclusive right is created by a municipal corporation under the authority of statute. See as to the power of a municipal corporation to create exclusive rights, 1 Dillon on Municipal Corporations (4th ed.), §§ 362, 374, 380, 385. The unusual case of a monopoly by a State of a private business was under consideration in Lowenstein v. Evans, 69 Fed. Rep. 908 (Cir. Ct. So. Car., 1895), where the Federal anti-trust act was held inapplicable to the monopoly of the liquor traffic by the State of South Carolina under a statute of that State.

[3] Thus, the provision of the Texas

of a monopoly, as created by act of government, is confined to such monopolies as result from the absorption by one individual or set of individuals of a right previously possessed by the community at large, and does not include the vesting in such individual or set of individuals of a new right not previously possessed by the community at large.[1] It may perhaps

constitution (art. 1, § 26), that "perpetuities and monopolies are contrary to the genius of a free government and shall never be allowed." For other provisions see Appendix. But such a provision does not apply to a restriction created in the exercise of the *police power*. See, for instance, State v. Call, 121 N. C. 643; s. c., 28 S. E. Rep. 517 (1897); People v. Warden of City Prison, 26 N. Y. App. Div. 228; s. c., 50 N. Y. Suppl. 56 (1898), and cases cited; also 2 Hare's American Constitutional Law, p. 779. In the same spirit have been established constitutional prohibitions against granting exclusive "privileges." See Stimson's American Statute Law, § 17; Matter of Union Ferry Co., 98 N. Y. 139 (1885). Under such provisions have been held invalid legislative grants of the exclusive privilege to supply gas to cities; thus, in St. Louis Gas-Light Co. v. St. Louis Gas, Fuel, etc. Co., 16 Mo. App. 52 (1884); Citizens' Gas-Light Co. v. Louisville Gas Co., 81 Ky. 263 (1883). These provisions, occasioned by the frequent and gross abuses perpetrated by specially chartered corporations, especially, perhaps, banking corporations, have led to the enactment of general laws authorizing the formation of corporations, which are a creation of the present century, and have been generally enacted in this country, as well as in Great Britain. See Diamond Match Co. v. Roeber, 106 N. Y. 473, 481; s. c., 13 N. E. Rep. 419 (1887). In Norwich Gas-Light Co. v. Norwich City Gas Co., 25 Conn. 19, 88 (1856), a monopoly created by legislative grant was held illegal, even in the absence of constitutional restriction. See, however, Saginaw Gas-Light Co. v. City of Saginaw, 28 Fed. Rep. 529, 535 (Cir. Ct. Mich., 1886; see note 2, p. 88, above). Though legislative grants condemned as monopolies have, as a rule, been special laws, yet the condemnation was extended to exclusive privileges sought to be secured under a *general law*, in People ex rel. v. Chicago Gas Trust Co., 130 Ill. 268, 297; s. c., 22 N. E. Rep. 798 (1889), a case of a corporation formed with power to purchase and hold the capital stock of any gas company in Chicago. Control of liquor traffic by the State itself was held not objectionable as a monopoly in Guy v. Commissioners of Cumberland Co., — N. C. —; s. c., 29 S. E. Rep. 771 (1898).

[1] See definitions, note 3, p. 87, above; also dissenting opinion of Story, J., in Charles River Bridge v. Warren Bridge, 11 Peters (U. S.), 420, 607 (1837). See also Patterson v. Wollman, 5 N. D. 608; s. c., 67

be doubted whether the definition of a monopoly as thus stated includes patents granted to an inventor or discoverer.

N. W. Rep. 1040 (1896), sustaining a grant of an exclusive ferry franchise, as not being within a constitutional prohibition against a grant to any citizen of "privileges or immunities which upon the same terms shall not be granted to all citizens." So has been sustained a grant of the right to supply gas to a municipality. New Orleans Gas Co. v. Louisiana Light Co., 115 U. S. 650, 659; s. c., 6 Supm. Ct. Rep. 252 (1885); but see Norwich Gas-Light Co. v. Norwich City Gas Co., 25 Conn. 19, 38 (1856; see note 3, p. 89, above). So has been sustained a grant of the right to so supply water. New Orleans Water-works Co. v. Rivers, 115 U. S. 674, 681; s. c., 6 Supm. Ct. Rep. 273 (1885); Bartholomew v. City of Austin, 52 U. S. App. 512; s. c., 85 Fed. Rep. 359 (5th Cir., 1898); but see City of Brenham v. Brenham Water Co., 67 Tex. 542; s. c., 4 S. W. Rep. 143 (1887); Altgelt v. City of San Antonio, 81 Tex. 436; s. c., 17 S. W. Rep. 75 (1891); Edwards County v. Jennings, 89 Tex. 618; s. c., 35 S. W. Rep. 1053 (1896). So a grant of a ferry franchise was sustained in City of Laredo v. International Bridge & Tramway Co., 30 U. S. App. 110; s. c., 66 Fed. Rep. 246 (5th Cir., 1895), where, however, the court fall into considerable confusion, through failure to apply the definition of a monopoly as above given.

This seems to be the most appropriate place for considering certain classes of cases that have, in our view, been erroneously placed under the definition of monopolies.

Owing, it would seem, to a failure to distinguish between the duty of a carrier to the general public, and the right of the carrier to select the instrumentalities to be employed in serving the public, such right of selection has in certain cases been denied. Thus, grants of exclusive privileges to hack proprietors were held void in McConnell v. Pedigo, 92 Ky. 465; s. c., 18 S. W. Rep. 15 (1892); Kalamazoo Hack & Bus Co. v. Sootsma, 84 Mich. 194; s. c., 47 N. W. Rep. 667 (1890); Montana Union Ry. Co. v. Langlois, 9 Mont. 419; s. c., 24 Pac. Rep. 209 (1890); Cravens v. Rodgers, 101 Mo. 247; s. c., 14 S. W. Rep. 106 (1890; under constitutional prohibition against "discrimination in charges or facilities in transportation . . . between transportation companies and individuals, or in favor of either"). So, privileges to express companies. Sandford v. Railroad Co., 24 Pa. St. 378 (1855); New England Express Co. v. Maine Central R. R. Co., 57 Me. 188, 196 (1869); or to connecting steamboat company. Indian River Steamboat Co. v. East Coast Transp. Co., 28 Fla. 387; s. c., 10 So. Rep. 480 (1891). But the granting of such an exclusive privilege is a mere incident of the general power of transportation, and is no more open to objection as a monopoly than is the lease or grant of specific property, as the exercise

However this may be on common-law principles, the legality of such patents has long been declared by statute.[1] But the mo-

of a power incident to the ownership of such property. Thus, it is said in United States v. Addyston Pipe & Steel Co., 54 U. S. App. 723, 755; s. c., 85 Fed. Rep. 271, 287 (6th Cir., 1898): "There is hardly more objection on the ground of public policy, to such a restriction upon a railway company in cases like these, than there would be to a restriction upon a lessor not to allow the subject-matter of the lease to be enjoyed by any one but the lessee during the lease. The privilege when granted is hardly capable of other than exclusive enjoyment." As to agreements with sleeping-car companies, Chicago, St. Louis, etc. R. R. Co. v. Pullman Southern Car Co., 139 U. S. 79; s. c., 11 Supm. Ct. Rep. 490 (1891), is here cited; as to those with express and stock-yard delivery companies, Express Cases, 117 U. S. 1; s. c., 6 Supm. Ct. Rep. 542, 628 (1886); Covington Stock-Yards Co. v. Keith, 139 U. S. 128; s. c., 11 Supm. Ct. Rep. 461 (1891); Butchers' & Drovers' Stock-yard Co. v. Louisville & N. R. R. Co., 31 U. S. App. 252; s. c., 67 Fed. Rep. 35 (6th Cir., 1895). In the Express Cases, above cited, where railroad companies were held not bound to furnish independent express companies with equal facilities for doing an express business on their passenger trains, the court say (117 U. S. 24): "The public require the carriage, but the company may choose its own appropriate means of carriage." A satisfactory discussion of the authorities is contained in Brown v. N. Y. Central, etc. R. R. Co., 75 Hun (N. Y.), 355; s. c., 27 N. Y. Suppl. 69 (1894), sustaining a grant by a railroad company of exclusive privileges to a coach company. In Alexandria Bay Steamboat Co. v. N. Y. Central, etc. R. R. Co., 18 N. Y. App.

[1] 21 Jas. 1, c. 3 (1624), saving from the operation of the act "any letters patents and grants of privilege for the term of fourteen years or under, hereafter to be made, of the sole working or making of any manner of new manufactures within this realm, to the true and first inventor and inventors of such manufactures, which others at the time of making such letters patents and grants shall not use, so as also they be not contrary to the law nor mischievous to the State, by raising prices of commodities at home, or hurt of trade, or generally inconvenient." (§ 5.) By art. 1, § 8, of the Federal constitution, Congress has exclusive power "to promote the progress of science and useful arts by securing for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries." Laws have been enacted to carry this provision into effect. As to extent of right of owner of patent to impose restrictions in granting licenses to use, compare American Rapid Telegraph Co. v. Connecticut Telephone Co., 49 Conn. 352 (1881), with State ex rel. v. Bell Telephone Co., 36 Ohio St. 296 (1880).

nopoly enjoyed by the owner of a patent does not, any more than the monopoly enjoyed by the owner of a specific piece

Div. 527; s. c., 45 N. Y. Suppl. 1091 (1897), an arrangement by a railroad company with one of two competing steamboat companies connecting with it at its terminus, by which one of such companies was given the advantage over the other in transportation, was sustained as legal, notwithstanding the prohibition of L. 1890, ch. 564; L. 1892, ch. 688, against combinations of corporations to prevent competition. So in Wiggins Ferry Co. v. Chicago & Alton R. R. Co., 73 Mo. 389, 410 (1881), was sustained an agreement by a railroad company to employ but one ferry at a given point. So in Old Colony R. R. Co. v. Tripp, 147 Mass. 35; s. c., 17 N. E. Rep. 89 (1888), a grant of the exclusive right to solicit baggage or merchandise from passengers at a given station. See also as to discrimination between connecting railroads, Prescott & Arizona Central R. R. Co. v. Atchison, Topeka & Santa Fe R. R. Co., 73 Fed. Rep. 438 (Cir. Ct. N. Y., 1896). As to New York statute (L. 1890, ch. 565) forbidding preferences by railroad company as between carriers transacting business on its premises, see N. Y. Central, etc. R. R. Co. v. Flynn, 74 Hun (N. Y.), 124; s. c., 26 N. Y. Suppl. 859 (1893); N. Y. Central, etc. R. R. Co. v. Sheeley, 27 N. Y. Suppl. 185 (N. Y. Supm. Ct., Sp. T., 1893). See as to agreement giving elevator exclusive right to handle grain transported over railroad, Richmond v. Dubuque & Sioux City R. R. Co., 26 Iowa, 191, 201 (1868). As before intimated, discriminations by carriers as between members of the general public seeking accommodations, stand on a different ground. See as to such, Scofield v. Railway Co., 43 Ohio St. 571, 600; s. c., 3 N. E. Rep. 907 (1885); Hays v. Pennsylvania Co., 12 Fed. Rep. 309 (Cir. Ct. Ohio, 1882); Burlington, C. & N. Ry. Co. v. Northwestern Fuel Co., 31 Fed. Rep. 652 (Cir. Ct. Minn., 1887); Kinsley v. Buffalo, N. Y. & P. R. R. Co., 37 Fed. Rep. 181 (Cir. Ct. Pa., 1888). A reason for condemning them has been found in their tendency to build up monopolies. This was conspicuously the case in Scofield v. Railway Co., above cited, a case of discrimination in favor of the Standard Oil Company; and see Messenger v. Pennsylvania R. R. Co., 37 N. J. Law, 531, 535 (1874); Louisville, Evansville, etc. R. R. Co. v. Wilson, 132 Ind. 517; s. c., 32 N. E. Rep. 311 (1892). See prohibition of § 2 of the Interstate Commerce Act against discriminations by carriers. Similar provisions exist in many of the States. The whole subject of such discriminations is, however, outside the scope of this treatise.

Another class of cases erroneously placed under the definition of monopolies is that of grants by a railroad corporation of the exclusive right of establishing lines of telegraphic communication along its right of way. Such grants were held void as monopolies in

of property, as, for instance, a factory, prevent the application to combinations among such owners, of the rules appli-

Western Union Tel. Co. v. American Union Tel. Co., 65 Ga. 160 (1880); Western Union Tel. Co. v. Burlington & S. W. Ry. Co., 11 Fed. Rep. 1 (Cir. Ct. Iowa, 1882); Baltimore & Ohio Tel. Co. v. Western Union Tel. Co., 24 Fed. Rep. 319 (Cir. Ct. La., 1884). Compare Western Union Tel. Co. v. Baltimore & Ohio Tel. Co., 23 Fed. Rep. 12 (Cir. Ct. Ind., 1885). See, however, Western Union Tel. Co. v. Atlantic & Pacific Tel. Co., 7 Bissell, 367 (1877). But, assuming the railroad corporation to otherwise have the power to make such a grant, the objection that it creates a monopoly would seem to be equally applicable to, for instance, a lease of its road that otherwise it has power to make. The real question in these cases was whether the grant was within the corporate powers, and indeed it would seem that the decisions (or at least that in 11 Fed. Rep.) might have rested solely on the ground that the grants were in conflict with the act of Congress of July 24, 1866. See also, as to the prohibition contained in such act, Pensacola Tel. Co. v. Western Union Tel. Co., 96 U. S. 1 (1877); Western Union Tel. Co. v. American Union Tel. Co., 9 Bissell, 72 (1879); Western Union Tel. Co. v. Baltimore & Ohio Tel. Co., 19 Fed. Rep. 660 (Cir. Ct. N. Y., 1884); Mercantile Trust Co. v. Atlantic & Pacific R. R. Co., 63 Fed. Rep. 513 (Cir. Ct. Cal., 1894); Union Trust Co. v. Atchison, Topeka & Santa Fe R. R. Co., 43 Pac. Rep. 701 (Supm. Ct. N. M., 1895). See as to prohibition in Texas act, Western Union Tel. Co. v. Baltimore & Ohio Tel. Co., 22 Fed. Rep. 133 (Cir. Ct. Tex., 1884). In a note by Francis Wharton to Western Union Tel. Co. v. Burlington & S. W. R. Co. (11 Fed. Rep. 1), above, it is said (p. 12): "If an opposition company could run its wires on a parallel line, without incurring an expense which would be prohibitive, it is hard to see why the railroad company that makes a contract of this kind should not be bound to it." And in Western Union Tel. Co. v. Chicago & Paducah R. R. Co., 86 Ill. 246, 252 (1877), the validity of such a contract was sustained, the court saying: "So long as any other company is left free to erect another line of poles, we see no just ground of complaint on the score of monopoly or the repression of competition." In Pacific Postal Tel. Cable Co. v. Western Union Tel. Co., 50 Fed. Rep. 493 (Cir. Ct. Wash., 1892), a telegraph company having a grant of such exclusive right was not allowed an injunction against the construction of another telegraph line on the same road. In Canadian Pacific Ry. Co. v. Western Union Tel. Co., 17 Canada Supm. Ct. 151, 161 (1889), a grant of such exclusive right was sustained against the objection that it created a monopoly. The court say: "The argument that an exclusive right to erect a telegraphic line along the line of railway is against public policy would seem to rest necessarily on this delusion, if it has any foundation at all, that the public generally have

cable generally to restrictions upon competition.[1] Within a comparatively recent period, the conception of a monopoly has been extended from a right created by government to a

a right to erect telegraphic lines along and on the line of railroad, and therefore their exclusion of any such right may cripple and prevent competition and tend to create monopolies; but as the public have clearly no such rights, and as there is nothing to prevent telegraph lines from being erected contiguous to and parallel with railroads, provided the right of way is secure, how can it be said to cripple and prevent competition, and tend to create monopolies, any more than the erection of the line of telegraph unconnected with the railway by private individuals for their own exclusive use, on a line they have procured at their own expense, would prevent competition on a line parallel or contiguous thereto? What is there to prevent the erection of a dozen different lines by a dozen different companies for their own exclusive use respectively?"

Another class of cases, sometimes erroneously classed with restrictions illegal as tending to produce monopolies, is that of agreements not to bid at public sales. See, for instance, Cleveland, Columbus, Cincinnati, etc. Ry. Co. v. Closser, 126 Ind. 348, 361; s. c., 26 N. E. Rep. 159 (1890). How superficial the analogy is may be seen from the circumstance that while restrictions tending to produce monopolies are regarded as objectionable on the ground that they *advance* prices, agreements not to bid are so regarded on the ground that they *reduce* them. The true ground of the condemnation of agreements not to bid seems to be that they operate as a *fraud* upon the person for whose benefit the sale is made. See 1 Bigelow on Fraud, ch. 8, § 3, p. 580; 1 Story's Equity Jurisprudence, § 293. In United States v. Addyston Pipe & Steel Co., 54 U. S. App. 723, 764; s. c., 85 Fed. Rep. 271, 293 (6th Cir., 1898), however, the term "conspiracy in restraint of trade," as used in the Federal anti-trust act, was held to apply to an agreement not to bid at a public letting.

[1] National Harrow Co. v. Quick, 67 Fed. Rep. 130 (Cir. Ct. Ind., 1895); National Harrow Co. v. Hench, 76 Fed. Rep. 667 (Cir. Ct. Pa., 1896); affirmed in 55 U. S. App. 53; s. c., 83 Fed. Rep. 36 (3d Cir., 1897; holding it no justification that the parties are exposed to litigation); National Harrow Co. v. Bement, 21 N. Y. App. Div. 290, 297; s. c., 47 N. Y. Suppl. 462 (1897); Strait v. National Harrow Co., 18 N. Y. Suppl. 224 (Supm. Ct., Sp. T., 1891; with a query whether the same rule would apply to an agreement limited to the life-time of the patents); Vulcan Powder Co. v. Hercules Powder Co., 96 Cal. 510; s. c., 31 Pac. Rep. 581 (1892; distinguishing the case of an agreement by the seller of a patent-right). For instance of such combinations held illegal, see § 22. But to the contrary is Columbia Wire Co. v.

condition produced by the acts of mere individuals; thus, where, within a given area, all sales of a given article are made by a single individual or set of individuals.[1]

Freeman Wire Co., 71 Fed. Rep. 302 (Cir. Ct. Mo., 1895), where a corporation organized under the laws of Illinois, for acquiring patents and granting licenses thereunder, and in possession of many, if not all, of the valuable patents for the manufacture of barbed wire, and the machines for so doing, and which had granted a large number of licenses under its patents, was held not subject to the anti-trust laws of Illinois, so as to defeat a suit by it for infringement of a patent. The court doubt National Harrow Co. v. Quick, above, but hold it perhaps distinguishable on the ground that in the case at bar the licensees were not restricted as to prices for wire manufactured under their licenses. Compare American Soda-Fountain Co. v. Green, 69 Fed. Rep. 333 (Cir. Ct. Pa., 1895); Central Shade Roller Co. v. Cushman, 143 Mass. 353; s. c., 9 N. E. Rep. 629 (1887). As to patentee so contracting with reference to his monopoly as to create another monopoly in an unpatented article, see Heaton-Peninsular Button Fastener Co. v. Eureka Specialty Co., 47 U. S. App. 146; s. c., 77 Fed. Rep. 288 (6th Cir., 1896).

[1] Of course, this enlarged conception of a monopoly calls for a new definition thereof. Thus, it is said in Herriman v. Menzies, 115 Cal. 16, 20; s. c., 46 Pac. Rep. 730 (1896): "A monopoly exists where all or so nearly all of an article of trade or commerce within a community or district is brought within the hands of one man or set of men, as to practically bring the handling or production of the commodity or thing within such single control, to the exclusion of competition or free traffic therein. Anything less than this is not a monopoly." So it is defined in People v. North River Sugar Refining Co., 54 Hun (N. Y.), 354, 377; s. c., 7 N. Y. Suppl. 406 (1889), as "any combination the tendency of which is to prevent competition in its broad and general sense, and to control, and thus at will enhance prices, to the detriment of the public, is a legal monopoly." See also San Diego Water Co. v. San Diego Flume Co., 108 Cal. 549, 559; s. c., 41 Pac. Rep. 495 (1895); California Steam Nav. Co. v. Wright, 6 Cal. 258 (1856); United States v. Trans-Missouri Freight Assoc., 19 U. S. App. 36, 73; s. c., 58 Fed. Rep. 58, 82 (8th Cir., 1893). In the case last cited it was held that no monopoly of trade was evidenced by the contract, *each member being left to compete* with every other for its share of the traffic, and competing companies not parties to the arrangement, being in operation in the same region. But see reversal in 166 U. S. 290; s. c., 17 Supm. Ct. Rep. 540 (1897). See also Re Greene, 52 Fed. Rep. 104, 115 (Cir. Ct. Ohio, 1892). So revolutionary has been the recent extension of the meaning attached to the word "monopoly" that there is even a tendency to wholly exclude

§ 19. Origin and basis of doctrine against restrictions upon competition.— Though for centuries monopolies have been condemned by the common law of England,[1] it follows from what we have seen that such condemnation was, until recently, limited in its scope to monopolies created by the crown. Stating here by way of anticipation that the condemnation now comprehends monopolies created merely by the acts of private parties, we proceed to consider the grounds on which it is based. The most obvious ground is the power of the monopolist to raise prices, thus producing injury to the public, especially in case of a monopoly in a necessary of life.[2] So the opportunity and temptation to produce commodities of an inferior quality are largely increased.[3] An-

what was originally covered by the term. With reference to the use of the term "monopolize" in the Federal and Louisiana anti-trust acts, it is said in American Biscuit & Manuf. Co. v. Klotz, 44 Fed. Rep. 721 (Cir. Ct. La., 1891): "In construing the Federal and State statutes *we exclude* from consideration all monopolies which exist by legislative grant; for we think the word 'monopolize' cannot be intended to be used with reference to the acquisition of exclusive rights under government concession, but that the lawmaker has used the word to mean 'to aggregate' or 'concentrate' in the hands of few, practically, and as a matter of fact, and according to the known results of human action, to the exclusion of others; to accomplish this end by what, in popular language, is expressed in the word 'pooling.'"

[1] Thus, in the "Case of Monopolies" (Darcy v. Allein), 11 Coke, 84*b* (1602), a grant by the crown of the exclusive right to make cards within the realm was held void as "a monopoly and against the common law."

[2] Thus, it is said in Darcy v. Allein, note 1, above (p. 86*b*), that, as one of "three inseparable incidents to every monopoly against the common wealth," "the price of the same commodity will be raised, for he who has the sole selling of any commodity may and will make the price as he pleases; and this word *Monopolium, dicitur απο του μονου και πωλεω quod est, cum unus solus aliquod genus mercaturæ universum emit, pretium ad suum libitum statuens.*" See also Central Ohio Salt Co. v. Guthrie, 35 Ohio St. 666 (1880); United States v. Trans-Missouri Freight Assoc., note 1, p. 97, below. But the doctrine seems capable of application to a *reduction* of prices injurious to producers. See, for instance, Texas Standard Oil Co. v. Adoue, 83 Tex. 650; s. c., 19 S. W. Rep. 274 (1892).

[3] Thus, in Darcy v. Allein, note 1, above, it is said that, as another

other ground not so commonly relied on, but still one on which considerable stress has been laid, is the injury to those forced out of or prevented from entering the same line of business.[1] It may be a question for the economist, rather than the jurist, whether, from the standpoint of the public interest, this injury is outweighed by benefits.[2] These being the commonly accepted grounds of the condemnation of monopolies, it now concerns us to note that this condemnation, originally confined to monopolies created by the crown, has, within a very recent period, been extended to other restrictions upon competition not amounting to monopolies,

"inseparable incident," "after the monopoly granted, the commodity is not so good and merchantable as it was before; for the patentee, having the sole trade, regards only his private benefit, and not the common wealth." See also People ex rel. v. American Sugar Refining Co., 7 Ry. & Corp. L. J. 88 (Super. Ct. San Francisco, 1890).

[1] Thus, in Darcy v. Allein, note 1, p. 96, above, it is said that, as another "inseparable incident," "it tends to the impoverishment of divers artificers and others, who before, by the labor of their hands in their art or trade, had maintained themselves and their families, who now will of necessity be constrained to live in idleness and beggary; and the common law . . . agrees also with the civil law." In State ex rel. v. Standard Oil Co., 49 Ohio St. 137, 187; s. c, 30 N. E. Rep. 279 (1892), it is said, referring to this ground as stated in Darcy v. Allein: "The third objection, though frequently overlooked, is none the less important. A society in which a few men are the employers and the great body are merely employees or servants, is not the most desirable in a republic; and it should be as much the policy of the laws to multiply the numbers engaged in independent pursuits or in the profits of production, as to cheapen the price to the consumer. Such policy would tend to an equality of fortunes among its citizens, thought to be so desirable in a republic, and lessen the amount of pauperism and crime." Similar views were expressed in Lufkin Rule Co. v. Fringeli, — Ohio St. —; s. c., 49 N. E. Rep. 1030 (1898). So, in United States v. Trans-Missouri Freight Assoc., 166 U. S. 290, 324; s. c., 17 Supm. Ct. Rep. 540 (1897), is emphasized the public misfortune caused by the loss of the "services of a large number of small but independent dealers."

[2] For an argument that combinations in restriction upon competition work no substantial injury to the public, see Stickney's "State Control of Trade and Commerce," ch. 6.

and created merely by the acts of private parties.[1] The propriety of this extension of the condemnation is generally recognized, in this country at least, but has in some quarters been denied, though it is not always clear whether the denial is based on the impropriety of allowing *any* such extension, or on the impropriety of allowing it in the particular

[1] How recently is indicated by so comparatively recent a decision as Kellogg v. Larkin, 3 Pinney (Wis.), 123, 147 (1851), where an agreement was sustained as not tending to create a monopoly, the court saying: "The cases cited all arose upon royal grants or by-laws, and consequently were cases of involuntary restraints. They do establish the doctrine that the grant of a monopoly is void; but they do not support the averment of the plaintiff in error. . . . I assert that the right to stifle competition by contract, so far as it is injurious to the parties contracting, has not before been denied or questioned for two hundred years, unless two cases reported in 4 Denio, 349, and 5 Denio, 434, are to be considered as denying the right." (Referring to Hooker v. Vandewater and Stanton v. Allen, respectively.) It is asserted by Francis Wharton in 3 Crim. Law Mag. 1, 5 (1882), that, "in this country, the right of individuals to buy up staples, provided no fraud or coercion be practiced, was not, at least between 1820 and 1875, questioned." Compare Queen Ins. Co. v. State, 86 Tex. 250, 269; s. c., 24 S. W. Rep. 397 (1893). But on the other hand it is said in People v. North River Sugar Refining Co., 54 Hun (N. Y.), 354, 377; s. c., 7 N. Y. Suppl. 406 (1889): "The monopoly with which the law deals is not limited to the strict equivalent of royal grants or people's patents." So in State ex rel. v. Standard Oil Co., note 1, p. 97, above: "The objections lie not to the manner in which the monopoly is created. The effect on industrial liberty and the price of commodities will be the same, whether created by patent, or by an extensive combination among those engaged in similar industries, controlled by one management. By the invariable laws of human nature, competition will be excluded and prices controlled in the interest of those connected with the combination or trust." Here it was also said (p. 186): "Monopolies have always been regarded as contrary to the spirit and policy of the common law," the only authority cited on this point being Darcy v. Allein, a case, as we have seen, of a monopoly created by act of government. In Stickney's "State Control of Trade and Commerce," which contains an elaborate criticism of the prevalent doctrine in condemnation of restrictions upon competition, the point that its true basis is the doctrine against monopolies is not considered. See, however, pp. 94, 95.

case.[1] But, in any view, it is clear that the condemnation cannot be extended to even all monopolies (to say nothing of mere restrictions upon competition, not amounting to

[1] Thus, in Kellogg v. Larkin, 3 Pinney (Wis.), 123, 150 (1851), recovery was allowed on a lease of a warehouse, though to the knowledge of the plaintiff, executed in furtherance of an agreement between proprietors of six wheat mills on the one hand, and the proprietors of twelve warehouses on the other, whereby the warehousemen were to give the former "*full, absolute and uninterrupted control of the Milwaukee wheat market*, so far as they shall be able to do so, by virtue of their capacity as warehousemen or vessel and dock owners." But, as said in United States v. Addyston Pipe & Steel Co., 54 U. S. App. 723, 752; s. c., 85 Fed. Rep. 271, 285 (6th Cir., 1898), this decision cannot be upheld in view of the more modern authorities. Although other grounds are relied on, the court (in Kellogg v. Larkin) thus vigorously attack the maxim that "competition is the life of trade": "If it be true that competition is the life of trade, it may follow such premises that he who relaxes competition commits an act injurious to trade; and not only so, but he commits an act of overt treason against the commonwealth. But I apprehend it is not true that competition is the life of trade. On the contrary, that maxim is one of the least reliable of the host that may be picked up in every market place. It is in fact the shibboleth of mere gambling speculation, and is hardly entitled to take rank as an axiom in the jurisprudence of this country. I believe universal observation will attest that for the last quarter of a century competition in trade has caused more individual distress, if not more public injury, than the want of competition. Indeed, by reducing prices below or raising them above values (as the nature of the case prompted), competition has done more to monopolize trade, or to secure exclusive advantages in it, than has been done by contract." Similar views as to the evils of competition had been expressed in Palmer v. Stebbins, 3 Pick. (Mass.) 188 (1825); Chappel v. Brockway, 21 Wend. (N. Y.) 157, 165 (1839). In Pierce v. Fuller, 8 Mass. 223 (1811), an agreement between proprietors of two rival stages between Boston and Providence, that one should not run a stage between those points, was sustained. The court say: "The public appear to have no interest in this question." In a note by Francis Wharton in 11 Fed. Rep. 11, it is suggested that this decision, and that in Perkins v. Lyman, 9 Mass. 522 (1813), may be explained on the ground that the acts complained of were breaches of trust. In Whitney v. Slayton, 40 Me. 224 (1855), the tendency in this country to excessive competition in business, was regarded as ground for liberally construing exceptions to the common-law rule against contracts in

monopolies).[1] The sole ownership of any particular piece of property involves the idea of a monopoly of the right to

restraint of trade. In Central Shade Roller Co. v. Cushman, 143 Mass. 353; s. c., 9 N. E. Rep. 629 (1887), a combination among manufacturers and sellers of curtain fixtures known as "wood balance shade rollers," to sell at a uniform price for their common benefit, dividing the profits, was sustained, they being the principal dealers and substantially supplying the market, though others were engaged in the business "in a small way." The court say: "The general purpose of the combination was to prevent, or rather to regulate, competition between the parties to it in the sale of the particular commodity which they made. This is a lawful purpose. . . . Even if such an agreement tends to raise the price of the commodity, it is one which the parties have a right to make. To hold otherwise would be to impair the right of persons to make contracts, and to put a price on the products of their own industry." In Skrainka v. Scharringhausen, 8 Mo. App. 522 (1880), an agreement among twenty-four proprietors of stone-quarries in a portion of St. Louis, providing for the sale of all the rubble building-stone of such quarries by a common agent for a period of six months, at prices fixed by the agreement, was sustained. By its terms the agreement was designed to prevent the depression of prices *resulting from competition*, making it impossible to work quarries at a profit. We shall show elsewhere

[1] A very little consideration will show the untenability of, for instance, the following oft-quoted statement in Hooker v. Vandewater, 4 Denio (N. Y.), 349 (1847): "Competition is the life of trade. It follows that whatever destroys *or even relaxes competition* in trade is injurious, if not fatal, to it." It is said in Oakdale Manuf. Co. v. Garst, 18 R. I. 484; s. c., 28 Atl. Rep. 978 (1894): "It does not follow that every combination in trade, even though such combination may have the effect to diminish the number of competitors in business, is therefore illegal. Such a rule would produce greater public injury than that which it would seek to cure. It would be impracticable. It would forbid partnerships and sales by those engaged in a common business. It would cut off consolidations to secure the advantages of united capital and economy of administration. It would prevent all restrictions and exclusive privileges, and hamper the familiar conduct of commerce in many ways. There may be many such arrangements which will be beneficial to the parties and not injurious to the public." In Oakes v. Cattaraugus Water Co., 143 N. Y. 480; s. c., 38 N. E. Rep. 461 (1894), it was held not illegal for a person whose business is threatened with competition, to persuade his competitor to abandon his business and take employment with the other, at a stated compensation.

use and dispose of such property, and to create restrictions upon the use thereof.[1] So of a contract for exclusive dealing,

(§ 21) that here the court improperly applied the test of *space limit*.

In Smith v. Scott, 4 Paton (Scotland), 17 (1798), a combination among those engaged in the business of chaise hirers or post-masters in Edinburgh, to raise the price of service, was declared illegal by the House of Lords, on appeal from Scotland. The court say: "The case is very different whether an individual might or might not ask what rate for posting he thought fit; but he must not make a party business of it." But this decision seems to have been generally overlooked; and notwithstanding that in this country restrictions upon competition created merely by the acts of private parties have, as a rule, been so unhesitatingly condemned, they seem thus far to have, as a rule, escaped condemnation in England, where restrictions that would now at least be held illegal in most of our States have been sustained, as appears from the following instances: In Hearn v. Griffin, 2 Chitty, 407 (1815), an agreement between two rival coach proprietors not to run in opposition to each other, and to charge the same prices, was sustained by the King's Bench against the objection that it was void as "in restraint of that competition in trade which is so conducive to the interest of the public." It was said by Lord Ellenborough: "This is merely a convenient mode of arranging two concerns which might otherwise ruin each other." In Wickens v. Evans, 3 Younge & J. 318 (1829), an agreement among three persons, rivals in the business of selling trunks and boxes in different parts of England, entered into in view of the inconvenience and loss resulting from rivalry, and whereby each should have the right to do business in certain districts to the exclusion of the others, was held not illegal as "in restraint of trade." It is clearly shown in United States v. Addyston Pipe & Steel Co., 54 U. S. App. 723, 750; s. c., 85 Fed. Rep. 271, 284 (1898), that this decision is opposed to later ones, in this country at least. In Shrewsbury & Birmingham Ry. Co. v. London & Northwestern Ry. Co., 16 Jurist, 311 (1851), an agreement between two

[1] In Mollyneaux v. Wittenberg, 39 Neb. 547; s. c., 58 N. W. Rep. 205 (1894), the prohibition of the Nebraska statute against "pools" and "trusts" was held not to apply to an agreement in a deed that the vendee should not use the property described for "hotel purposes for two years." So in United States Chemical Co. v. Provident Chemical Co., 64 Fed. Rep. 946 (Cir. Ct. Mo., 1894), a covenant in a lease not to engage in the business covered by the lease, was held valid as a restraint of trade, but to contain "none of the elements of a trust or combination." Compare decisions as to right of carrier to select instrumentalities for service of the public, and as to grants by railroads of exclusive privileges to telegraph companies, § 18, above.

service or agency.[1] So in smaller communities, where the exercise of a given trade or profession is confined to a single individual, be he butcher, grocer, tailor or builder, there exists a monopoly. And in such a case the monopoly is

railway companies tending to prevent competition, was held not unlawful, the operation of the agreement being, however, limited to one particular line of road. So in Hare v. London & Northwestern Ry. Co., 2 Johnson & Hemming, 80, 103 (Eng. Ch., 1861), an agreement among competing railroad companies for a division of profits in certain fixed proportions, was held not illegal, as preventing competition, in the absence of statutory provisions. The court say: "It is a mistaken notion that the public is benefited by pitting two railway companies against each other till one is ruined, the result being at last to raise the fares to the highest possible standard." So far as such restrictions are held illegal in England, it would seem to be according to the test of *reasonableness*. See Collins v. Locke, § 22, below. On the other hand, as is pointed out in United States v. Addyston Pipe & Steel Co., above (54 U. S. App. 753), the decision in Mogul S. S. Co. v. McGregor, L. R. App. Cas. (1892), 25, is not in point on this branch of our subject.

[1] In Ellerman v. Chicago Junction Railways, etc. Co., 49 N. J. Eq. 217, 252; s. c., 23 Atl. Rep. 287 (1891), an agreement between proprietors of stockyards and their principal patrons, whereby the latter were to deal with the former exclusively, and not engage in the same business, was sustained. The court say: "The non-competition was but an incident subsequent to the affirmative agreement to remain the customers and patrons of the transit company; but if the purpose of the agreement had been the prevention of competition, such a purpose would have been lawful." In Matthews v. Associated Press of N. Y., 136 N. Y. 333; s. c., 32 N. E. Rep. 981 (1893), was sustained a by-law of an association of members of the press forbidding any member to "receive or publish the regular news dispatches of any other news association covering a like territory and organized for a like purpose." So in Woods v. Hart, 50 Neb. 497, 504; s. c., 70 N. W. Rep. 53 (1897), of an agreement for an exclusive agency for the sale of real estate, the appointment as agent not being for a fixed or definite period. So in Welch v. Phelps & Bigelow Windmill Co., 89 Tex. 653; s. c., 36 S. W. Rep. 71 (1896), the Texas anti-trust act of 1889 was held not to apply to a mere arrangement between principal and agent, though giving the exclusive right to sell in certain territory and fixing prices, but not investing the agent with title to the goods sold. But in Texas Brewing Co. v. Anderson, 40 S. W. Rep. 737 (Tex. Civ. App., 1897), the contract was held to be one of sale and not of agency, notwithstanding the use of the word "agents," and to be in contravention of such act. Agreements for exclusive trade were sustained in Catt v. Tourle,

frequently the direct result of efforts to drive all other competitors from the field. Nor is the monopoly necessarily illegal because exercised by a combination of individuals. A partnership of butchers, grocers, tailors or builders in a small community is not necessarily regarded as illegal, though having a monopoly of its line of business in that community, and though having secured such monopoly as a result of efforts to drive all other competitors from the field.[1] It has been declared that the very existence of a monopoly involves a presumption that the monopoly is illegal,[2] but it

38 L. J. Ch. 665 (1869); Clark v. Crosby, 37 Vt. 188 (1864); Keith v. Herschberg Optical Co., 48 Ark. 138; s. c., 2 S. W. Rep. 777 (1887); Livestock Assoc. of N. Y. v. Levy, 54 N. Y. Super. Ct. 32 (1886); George v. East Tennessee Coal Co., 15 Lea (Tenn.), 455 (1885); Schwalm v. Holmes, 49 Cal. 665 (1875); Brown v. Rounsavell, 78 Ill. 589 (1875); Bald Eagle Valley R. R. Co. v. Nittany Valley R. R. Co., 171 Pa. St. 284; s. c., 33 Atl. Rep. 239 (1895); Palmer v. Stebbins, 3 Pick. (Mass.) 188 (1825). Agreements for exclusive employment were sustained in Pilkington v. Scott, 15 M. & W. 657 (1846); Hartley v. Cummings, 5 C. B. 247 (1847); Carnig v. Carr, 167 Mass. 544; s. c., 46 N. E. Rep. 117 (1897). Compare Morris v. Colman, 18 Vesey, 437 (1812; sustaining agreement with theater proprietors not to write dramatic pieces for any other theater). So even of an agreement to serve for life. Wallis v. Day, 2 M. & W. 273 (1837). But an agreement for exclusive trade, though legal considered by itself, may yet be illegal as a part of a scheme illegal as in restriction upon competition. This principle seems to have been overlooked in the cases involving the legality of the methods of the "Distilling & Cattle Feeding Company;" but see on this point, § 30.

[1] The difficulty of establishing a sharp line of distinction in such cases, was seen in Marsh v. Russell, 66 N. Y. 288 (1876), where a distinction is taken between a partnership formed for the honest purpose of carrying on a joint business, with the incidental effect of preventing competition, and a partnership the primary object of which is to prevent competition. But this introduces the uncertain test of *intent*, as to which see § 2. In Ontario Salt Co. v. Merchants' Salt Co., 18 Grant (Ontario), 540, 544 (1877), the court answer the objection that an agreement among manufacturers of salt for sale of their stock through a common agency, tended to create a monopoly, by saying: "If the effect was to constitute a partnership, there can be nothing objectionable in the stipulation that all the salt produced — which is to form the partnership stock — should be sold through the agency of the trustees." Compare as to "pools," § 26.

[2] "The presumption is always

seems doubtful whether such presumption is of substantial service. Certainly it would be difficult to apply it to the monopolies we have instanced as existing in smaller communities, and, in case of the more extensive monopolies, the evidence of illegality is commonly sufficient without the aid of any such presumption. But while here contenting ourselves with the assumption that the doctrine condemning monopolies, originally confined to those created by the crown, now extends to *some but not all* monopolies, or other restrictions upon competition created by the acts of private parties, we reserve for consideration elsewhere the question of the test to be applied in determining what restrictions upon competition are legal, and what not. It may be added that this

against the validity of such agreements," *i. e.*, in prevention of competition. Hoffman v. Brooks, 23 Am. Law Reg. (N. S.) 648 (Super. Ct. Cinn., 1884). So in Morris Run Coal Co. v. Barclay Coal Co., 68 Pa. St. 173, 185 (1871), such presumption was applied, but under the mistaken supposition, elsewhere considered, that the doctrine against restrictions upon competition, is based on that against contracts in restraint of trade. In Cleveland, Columbus, Cincinnati, etc. Ry. Co. v. Closser, 126 Ind. 348, 360, 363; s. c., 26 N. E. Rep. 159 (1890), the presumption was applied to a combination among competing carriers. But the existence of such a presumption was denied in United States v. Trans-Missouri Freight Assoc., 19 U. S. App. 36, 68; s. c., 58 Fed. Rep. 58, 78 (8th Cir., 1893); and see Leslie v. Lorillard, 110 N. Y. 519, 533; s. c., 18 N. E. Rep. 363 (1888); Herriman v. Menzies, 115 Cal. 16, 21; s. c., 46 Pac. Rep. 730 (1896). So in Ives v. Smith, 8 N. Y. Suppl. 645, 653, affirmed in 8 Id. 46 (Supm. Ct., Gen. T., 1889), where were sustained traffic contracts between railroad companies, the court say: "A court should not stamp with invalidity contracts which have existed for years, and under which rights have been created and obligations assumed, without the clearest conviction that they come within the condemned or illegal class. The avoidance of contracts on the ground that they are against public policy, is reluctantly ordered by the courts." Compare the frequently quoted remarks of Jessel, M. R., in Printing & Numerical Registering Co. v. Sampson, 19 L. R. Eq. Cas. 462 (1875), that "if there is one thing which, more than another, public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred, and shall be enforced by courts of justice."

extension of the doctrine seems to have made it an academic question of little practical importance, whether what are known as *forestalling*, *regrating* and *ingrossing* are illegal at common law or by statute;[1] such cases are clearly covered by the doctrine against monopolies as extended.[2]

§ 20. Legislation against restriction upon competition — Scope of Federal and State legislation respectively. — Legislation against restrictions upon competition, commonly called "anti-trust legislation," is a growth of the last ten years, but already exists in a majority of the States of the Union,[3] and, indeed, most of the questions presented

[1] In 3 Stephen's History of the Criminal Law of England, ch. 30, p. 199, it is said: "Forestalling, ingrossing and regrating was the offense of buying up large quantities of any article of commerce for the purpose of raising the price. The forestaller intercepted goods on their way to market and bought them up, so as to be able to command what price he chose when he got to the market. The ingrosser or regrator — for the two words had much the same meaning — was a person who, having bought goods wholesale, sold them again wholesale. This was regarded as a crime." These offenses are said, in 2 Wharton's Criminal Law (10th ed.), § 1849, to have been taken from the Roman law. It will be noted that these offenses could be committed by a single individual. In Pettamberdass v. Thackoorseydass, 7 Moore P. C. C. 239, 262 (1850), it is said that "ingrossing can be committed only with respect to the necessaries of life;" and see article by W. F. Dana in 7 Harv. Law Rev. 338, 344 (1894). See as to such statutes, Queen Ins. Co. v. State, 86 Tex. 250, 269; s. c., 24 S. W. Rep. 397 (1893). In Oliver v. Gilmore, 52 Fed. Rep. 562, 565 (Cir. Ct. Mass., 1892), a case of an agreement to close manufacturing works, it is said that "the contract would seem to be in violation of the old rules of the common law (*i. e.*, against forestalling and ingrossing), intended to prevent the gathering up of the control of commodities into few hands." But *query* in the absence of evidence tending to show monopoly? See, on the general question whether such acts were illegal at common law, article by Prof. T. W. Dwight in 3 Pol. Sci. Quart. 592, 609 (1888).

[2] Though in Queen Ins. Co. v. State, note 1, above, the view was expressed that the doctrine of the illegality of such monopolies has its origin in these rules.

[3] See Appendix. See such legislation epitomized and criticised by S. C. T. Dodd, in 7 Harv. Law Rev. 157, 164 (1893). For a reference to some ancient legislation against monopolies, see article by C. C. Allen in 28 Am. Law. Rev. 828, 831 (1894).

to the courts for decision respecting the validity of such restrictions now arise under such statutes. Questions involving the construction of such statutes, so far as they fall within the proper scope of this treatise, will be considered in their appropriate places. Of course, such legislation is subject to the constitutional limitations,[1] and governed by the rules of

[1] In Anheuser-Busch Brewing Assoc. v. Houck, 27 S. W. Rep. 692 (Tex. Civ. App., 1894), affirmed as Houck v. Anheuser-Busch Brewing Assoc., in 88 Tex. 184; s. c., 30 S. W. Rep. 869 (1895); Waters-Pierce Oil Co. v. State, — Tex. Civ. App. —; s. c., 44 S. W. Rep. 936 (1898; so also of the act of 1895), the Texas anti-trust act of 1889 was held constitutional as not being class legislation. See Hathaway v. State, 36 Tex. Crim. App. 261, 277; s. c., 36 S. W. Rep. 465 (1896). As to whether the Michigan anti-trust act of 1889 is unconstitutional on that ground, see Merz Capsule Co. v. United States Capsule Co., 67 Fed. Rep. 414 (Cir. Ct. Mich., 1895). But in Re Grice, 79 Fed. Rep. 627, 645 (Cir. Ct. Tex., 1897), the provision of the Texas act that it should "not apply to agricultural products or live-stock while in the hands of the producer or raiser" (it appearing that four-fifths of the people of the State were engaged in producing and raising agricultural products and live-stock), was held violative of the fourteenth amendment of the Federal constitution as class legislation, depriving persons within the jurisdiction of the State of "the equal protection of the laws." See criticism and disapproval of this decision in People ex rel. v. American Tobacco Co., 2 Chicago L. J. Weekly, 249 (Cook Co. Cir. Ct., 1897?), where the Illinois act is said to have been "evidently copied from the Texas act." In Waters-Pierce Oil Co. v. State, above, the Texas acts of 1889 and 1895, including provisions for forfeiting the right of a foreign corporation to do business in the State, as a penalty for violating the acts, were sustained as exercises of the police power, against the objection that they contravened the prohibition of the fourteenth amendment against "depriving any person of life, liberty or property without due process of law." The distinction between prohibitions of reasonable and of unreasonable restrictions was not, however, discussed. In United States v. Trans-Missouri Freight Assoc., 166 U. S. 290; s. c., 17 Supm. Ct. Rep. 540 (1897), (see § 21), where the prohibition of the Federal anti-trust act was declared to apply to reasonable as well as unreasonable restraints of trade, it was not considered whether a prohibition of such reasonable restraints might not be in contravention of the prohibition of the fifth amendment of the Federal constitution against "depriving of life, liberty or property without due process of law." That it is in contravention of such prohibition, see vigorous discussion by W. D. Guthrie in 11 Harv. Law Rev. 80 (1897); by P. C. Knox in 36 Am. Law Reg. & Rev. 417 (1897). But see article

construction[1] applicable to statutes generally. The general power of legislation possessed by the respective States includes the power to enact such legislation, but is subject to an important limitation created by the provision of the Federal constitution vesting in Congress the exclusive power "to regulate commerce with foreign nations and among the several States."[2] On the other hand, the effect of legisla-

by E. B. Whitney in 7 Yale Law Jour. 285 (1898).

[1] With reference to the Federal anti-trust act it is said in The Charles E. Wisewall, 74 Fed. Rep. 802 (Dist. Ct. N. Y., 1896), that "the courts have found it very difficult to apply the indefinite generalities of this act to the facts of any given case." It was held in Re Greene, 52 Fed. Rep. 104, 112 (Cir. Ct. Ohio, 1892), not to be retroactive, or to have any *ex post facto* operation; but in United States v. Trans-Missouri Freight Assoc., 166 U. S. 290, 342; s. c., 17 Supm. Ct. Rep. 540 (1897), to apply to a continuance after its passage of an agreement entered into before. In United States v. Trans-Missouri Freight Assoc., 19 U. S. App. 36, 67; s. c., 58 Fed. Rep. 58, 77 (8th Cir., 1893); Greer v. Stoller, 77 Fed. Rep. 1 (Cir. Ct. Mo., 1896), it was held, as a penal statute, to be subject to the rule of strict construction. In the case last cited the remedies created by the act are said to be "exclusive of all others." In Queen Ins. Co. v. State, 22 S. W. Rep. 1048 (Tex. Civ. App., 1893), the Texas act of 1893 had been held inoperative for failure to declare trusts illegal; but this decision was reversed in 86 Tex. 250, 268; s. c., 24 S. W. Rep. 397 (1893). As to effect of provision of New York act of 1897 for examination of witnesses, see Matter of Attorney-General, 22 N. Y. App. Div. 285; s. c., 47 N. Y. Suppl. 883 (1897).

[2] In Fuqua v. Pabst Brewing Co., 90 Tex. 298; s. c., 38 S. W. Rep. 29, 750 (1897), recovery was not allowed for beer sold by a brewing company transacting business in another State, and shipping the beer from that State under a contract providing that, during the performance of the contract, the company would not sell or consign any beer of its manufacture to any other party at Amarillo, Texas (where the buyer transacted business), and that the buyer would neither sell nor be interested in the sale of any beer not manufactured by the company, the company to erect a cold-storage house, and allow the buyer the free use of the same. The transaction was held within the Texas anti-trust act of 1889, notwithstanding the commerce clause of the Federal constitution; this on the ground that the contract dealt with the beer after it had ceased to be an article of interstate commerce. The court say (p. 302): "A portion of the stipulations of the contract being lawful, and the others unlawful, the taint of illegality affects and destroys the whole. The commerce clause of

tion enacted by Congress is limited to such as is merely incidental to the power to so regulate commerce.[1] As we shall

the constitution was not designed to protect the contractual rights of a person who thus voluntarily intermingles an otherwise legal interstate commerce transaction with an entirely local and unlawful one." But it was also held that exemption from the operation of the State statute was prevented by the Wilson Act of Congress of August 8, 1890. See, also, Anheuser-Busch Brewing Assoc. v. Houck, 27 S. W. Rep. 692 (Tex. Civ. App., 1894); affirmed as Houck v. Anheuser-Busch Brewing Assoc., in 88 Tex. 184; s. c., 30 S. W. Rep. 869 (1895). So the State statute was held applicable in Waters-Pierce Oil Co. v. State, — Tex. Civ. App. —; s. c., 44 S. W. Rep. 936 (1898), where the right of a foreign corporation to do business in the State was declared forfeited, it appearing that it not only shipped its products into the State, but entered into agreements with dealers in the State for exclusive dealing, by which the latter were to buy and sell the products of such corporation exclusively, and not to sell the products so bought to any one dealing with a dealer in competitive oils. But was not all this a mere incident of the interstate dealing? Still further seems to go People ex rel. v. American Tobacco Co., 2 Chicago L. J. Weekly, 249 (Cook Co. Cir. Ct., 1897?), where the authority of the State to exclude a foreign corporation, illegal as a restriction upon competition, was sustained as an exercise of the police power, against the objection that the corporation shipping its products into the State was engaged in interstate commerce. But the soundness of this decision is very doubtful in view of such decisions of the United States Supreme Court as Bowman v. Chicago & Northwestern Ry. Co., 125 U. S. 465; s. c., 8 Supm. Ct. Rep. 689 (1888).

[1] Of course, the Federal anti-trust act has no application to trade or commerce wholly within the boundaries of a given State. See The Charles E. Wiswall, 57 U. S. App. 179; s. c., 86 Fed. Rep. 671 (2d Cir., 1898); but as to a Territory, see Moore v. United States, 56 U. S. App. 471; s. c., 85 Fed. Rep. 465 (8th Cir., 1898). Its constitutionality was asserted in United States v. Patterson, 55 Fed. Rep. 605, 638 (Cir. Ct. Mass., 1893). But in United States v. E. C. Knight Co., 156 U. S. 1; s. c., 15 Supm. Ct. Rep. 249 (1895), affirming 60 Fed. Rep. 306 (Cir. Ct. Pa., 1894), the act was held to have no application to a mere monopoly in manufacture in the United States, though of a necessity of life (sugar). The court say (p. 13): "The fact that an article is manufactured for export to another State does not of itself make it an article of interstate commerce;" and of the act (p. 16): "Congress did not attempt thereby to assert the power to deal with monopoly directly as such, or to limit and restrict the rights of corporations created by the States or the citizens of the States in the acquisi-

see elsewhere, anti-trust legislation generally has, particularly by reason of the failure to distinguish between the doctrine against restrictions upon competition, and that against

tion, control or disposition of property; or to regulate or prescribe the price or prices at which such property or the products thereof should be sold; or to make criminal the acts of persons in the acquisition and control of property, which the States of their residence or creation sanctioned or permitted." See elaborate dissenting opinion of Harlan, J. Compare United States v. Jellico Mountain Coal, etc. Co., 46 Fed. Rep. 432 (Cir. Ct. Tenn., 1891). The decision in United States v. E. C. Knight Co. was applied under similar conditions in Merz Capsule Co. v. United States Capsule Co., 67 Fed. Rep. 414 (Cir. Ct. Mich., 1895). The same conclusion had been reached in Dueber Watch-case Manuf. Co. v. Howard Watch & Clock Co., 35 U. S. App. 16; s. c., 66 Fed. Rep. 637 (2d Cir., 1895); also in Re Greene, 52 Fed. Rep. 104, 112 (Cir. Ct. Ohio, 1892); and see National Distilling Co. v. Cream City Importing Co., 86 Wis. 352; s. c., 56 N. W. Rep. 864 (1893). For a vigorous criticism of the decision in United States v. E. C. Knight Co., see article by Jackson Guy in 1 Va. Law Reg. 709 (1896); see also reply by John Hunter in 2 Id. 160 (1896). In United States v. Addyston Pipe & Steel Co., 54 U. S. App. 723, 770; s. c., 85 Fed. Rep. 271, 297 (6th Cir., 1898), it is said of United States v. E. C. Knight Co. that it "draws the distinction between a restraint upon the business of manufacturing, and a restraint upon the trade or commerce between the States in the articles after manufacture, with the manifest purpose of showing that the regulating power of Congress under the constitution could affect only the latter, while the former was not under Federal control and rested wholly with the States."

More recent attempts to apply the act have been successful. In United States v. Hopkins, 82 Fed. Rep. 529 (Cir. Ct. Kan., 1897), an injunction was granted under § 4 of the act, dissolving the "Kansas City Live-Stock Exchange," composed of persons engaged in the live-stock commission business, the purpose of which was to monopolize the business of buying and selling stock at Kansas City. Their method of business is thus described (p. 537): "The shipment of live-stock from growers, dealers and traders in Kansas, Colorado, Nebraska, Missouri, Texas, New Mexico, Arizona, Oklahoma and other States and Territories, is solicited by the commission merchant in various ways, but largely by the personal solicitation of agents who travel about the country and interview the stockmen. Frequently the commission man makes loans of money on the herds, secured by chattel mortgage. The consignment of the stock is made to the commission man or firm at the Kansas City stock-yards, and there unloaded. Frequently the shipper draws on the consignee through his local bank, with the bill of shipment attached;

contracts in restraint of trade, been extended much beyond its proper scope, often with mischievous results.[1]

and, when the stock is sold, the loan on the cattle, or the draft on the consignee, as the case may be, is paid out of the proceeds, and the balance remitted to the shipper. While the broker is soliciting consignments of stock for sale, he is also on the alert for purchasers. He sells the stock without regard to its destination. Some is reshipped to other markets in other States, notably to Chicago and St. Louis. Much of it, especially hogs, is slaughtered at the large packing-houses near by, in Kansas and Missouri." This was held to be interstate commerce, and not a mere incident or aid to such commerce. So, notwithstanding that the place of business of the exchange was located on both sides of the line between Kansas and Missouri. The court overrule the contention that when the live-stock reached Kansas City, and was unloaded into the stock-yards, it ceased to be the subject of interstate commerce, saying (p. 541): "This live-stock is shipped from different States for immediate sale, and, if the market at Kansas City is not satisfactory, it is to be shipped to another market. I cannot believe that it ceases to be the subject of interstate commerce when unloaded into the stock-yards." But it does not seem clear to us that the business as described was wholly interstate business. See comments on United States v. Coal Dealers' Assoc., below. In United States v. Coal Dealers' Assoc., 85 Fed. Rep. 252 (Cir. Ct. Cal., 1898), the prohibition of the act was held to apply to an agreement between a combination of dealers importing coal from other States and foreign countries, and an association of retail dealers, whereby the business of dealing was regulated and the retail price fixed. Applying the doctrine of Leisy v. Hardin, 135 U. S. 100; s. c., 10 Supm. Ct. Rep. 681 (1890), the court say (p. 266): "The claim that the coal is not sold until imported, delivered and bulk broken is not sufficient. The principle of the original package does not apply to the sale of coal." But is this decision in harmony with Pittsburgh & Southern Coal Co. v. Bates, 156 U. S. 577; s. c., 15 Supm. Ct. Rep. 415 (1895)? and see Emert v. Missouri, 156 U. S. 296; s. c., 15 Supm. Ct. Rep. 367 (1895). In United States v. Addyston Pipe & Steel Co., 54 U. S. App. 723; s. c., 85 Fed. Rep. 271 (6th Cir., 1898), the prohibition of the act was held to apply to an agreement not to make a contract in certain States for the sale of goods to be delivered in another State; also to an agreement not to make such a contract below a certain price. After discussing Robbins v. Taxing District, 120 U. S. 489; s. c., 7 Supm. Ct. Rep. 592 (1887), and similar cases, it is said (54 U. S. App. 767): "If the soliciting of orders for and the sale of goods in one State to be delivered from another State, is interstate commerce in its strictest and highest sense, such that the States are excluded by the Federal

[1] See § 21.

§ 21. Origin and basis of doctrine against contracts in restraint of trade.— Having now seen the origin and basis of the doctrine against monopolies, including those created by the mere acts of private parties, it becomes desirable to examine the origin and basis of the doctrine against contracts in restraint of trade. This, not because such contracts are in any proper sense within the scope of this treatise, but merely because great confusion has resulted from the attempt to find in the doctrine against such contracts a basis for the doctrine against monopolies. As we shall show, these doctrines are essentially distinct as to origin and basis. The doctrine against monopolies was first clearly established about the beginning of the seventeenth century.[1] But some two centuries earlier had been established the doctrine against contracts in restraint of trade, in its original form condemning any agreement whereby any person bound himself not to exercise his trade, without any reference to the character of any limitation as to time or space.[2] For some two cen-

constitution from a right to regulate or tax the same, it seems clear that contracts in restraint of such solicitations, negotiations and sales are contracts in restraint of interstate commerce. The anti-trust act is an effort by Congress to regulate interstate commerce. Such commerce as the States are excluded from burdening or regulating in any way, by tax or otherwise, because of the power of Congress to regulate interstate commerce, must of necessity be the commerce which Congress may regulate, and which, by the terms of the anti-trust act, it has regulated." So again (p. 771): "The goods are not within the control of Congress until they are in actual transit from one State to another; but the negotiations and making of sales which necessarily involve in their execution the delivery of merchandise across State lines are interstate commerce, and so within the regulating power of Congress, even before the transit of the goods in performance of the contract has begun." Whether the provisions of the act may be enforced in a State court, see People ex rel. v. American Tobacco Co., 2 Chicago L. J. Weekly, 249 (Cook Co. Cir. Ct., 1897?); and compare Moore v. United States, 56 U. S. App. 471; s. c., 85 Fed. Rep. 465 (8th Cir., 1898).

[1] See § 19.

[2] Thus, a contract not to use the art of a dyer's craft within a certain city for half a year was condemned with the exclamation by Hull, J.: "And, by G—d, if the plaintiff were here he should go to prison until he paid a fine." Year Book, 2 Henry 5, fol. 5, pl. 26 (1415). So nearly two centuries

turies the doctrine seems to have thus stood without modification.[1] Afterwards it was modified by allowing an exception of contracts containing limitations as to time and space; in other words, *partial* restraints.[2] And at last, in the present century, more than five centuries after its introduction, the test of limitation as to time and space has been abandoned, and the simple test of *reasonableness*, without reference to limitations as to time and space, adopted.[3] It seems clear that the doctrine, in its origin, though based on grounds of public policy,[4] had no reference whatever to the evils of monopoly, but simply to the supposed evil resulting from the withdrawal from trade of one actively engaged therein,

later, in Colgate v. Bacheler, 3 Cro. Eliz. 872 (1602), an agreement not to use the trade of haberdasher "within the county of Kent, the cities of Canterbury or Rochester" was held bad, the court saying: "This condition is against law, to prohibit or restrain any to use a lawful trade *at any time or at any place*."

[1] See note 2, p. 111, above.

[2] Rogers v. Parrey, Bulstrode, 136 (1613), is said in Spelling on Trusts and Monopolies, § 5, to be the first case that recognized the validity of a contract containing such limitations. But since Mitchel v. Reynolds, 1 P. Wms. 181 (1711), their validity has been well established. Here was sustained an agreement by the lessor of a bakehouse not to exercise the trade of baker within a certain parish for five years.

[3] Thus, in Nordenfelt v. Maxim Nordenfelt Guns & Ammunition Co., L. R. App. Cas. 1894 (535), was sustained as reasonable and valid an agreement *without limit as to space*. Compare Trenton Potteries Co. v. Oliphant, — N. J. Eq. —; s. c., 39 Atl. Rep. 923 (1898). It seems to have long been established that such a contract might be sustained, though without limit as to time. See Spelling on Trusts and Monopolies, § 15; French v. Parker, 16 R. I. 219; s. c., 14 Atl. Rep. 870 (1888). In Lufkin Rule Co. v. Fringeli, — Ohio St. —; s. c., 49 N. E. Rep. 1030 (1898), contracts in general restraint of trade (in this case covering the United States) are condemned, and such decisions as Diamond Match Co. v. Roeber, 106 N. Y. 473; s. c., 13 N. E. Rep. 419 (1887), disapproved, apparently on the supposition that such a contract, even between two persons only, *necessarily* tends to create a monopoly. But a very little reflection will reveal the fallacy of such a supposition.

[4] The interest of the *public alone*, and not of the parties to the contract, being considered, according to Lawrence v. Kidder, 10 Barb. (N. Y.) 641, 648 (1851); and see Greenhood on Public Policy, p. 686; but see note 1, p. 113, below.

whether such evil be regarded as consisting of the increased danger of his becoming a public burden, or simply a diminution of the product of commodities useful to the public.[1] This may be made clear by illustration. Thus, at least until

[1] According to 2 Parsons on Contracts (8th ed.), p. 872 (star p. 749), the doctrine grew out of the law of apprenticeship, it being here said: "By this law, in its original severity, no person could exercise any regular trade or handicraft except after a long apprenticeship, and, generally, a formal admission to the proper guild or company. If he had a trade, he must continue in that trade, or have none. To relinquish it, therefore, was to throw himself out of employment; *to fall as a burden upon the community; to become a pauper.*" See also Greenhood on Public Policy, p. 685; Pollock on Contracts (2d Am. ed.), p. 312; Spelling on Trusts and Monopolies, § 3; Bingham v. Maigne, 52 N. Y. Super. Ct. 90 (1885); Long v. Towl, 42 Mo. 545 (1868); Skrainka v. Scharringhausen, 8 Mo. App. 522 (1880). In Lawrence v. Kidder, note 4, p. 112, is suggested as an additional and distinct reason for the rule, the desirability that "all the various trades and employments of society should be pursued each in its due proportion." S. P., Harrison v. Lockhart, 25 Ind. 112 (1865). In Mitchel v. Reynolds, 1 P. Wms. 181, 190 (1711), it is stated as the true reasons of the doctrine, "the mischief which may arise to the party by the loss of his livelihood and the subsistence of his family; to the public by depriving it of a useful member." See also Alger v. Thacher, 19 Pick. (Mass.) 51 (1837); Oregon Steam Navigation Co. v. Winsor, 20 Wall. 64 (1873); Newell v. Meyendorff, 9 Mont. 254; s. c., 23 Pac. Rep. 333 (1890); Gibbs v. Consolidated Gas Co. of Baltimore, 130 U. S. 396, 409; s. c., 9 Supm. Ct. Rep. 553 (1889). It is indeed intimated in Mitchel v. Reynolds as an *additional* reason for the rule, "the great abuses these voluntary restraints are liable to; as, for instance, from corporations who are perpetually laboring for *exclusive advantages in trade and to reduce it into as few hands as possible.*" But this remark is made without apparent consideration, and seems entitled to little weight, coming after the doctrine had been established in England for three centuries. See note 2, p. 111, above. Such remark is the starting point of the view expressed in subsequent cases, that the prevention of monopolies is an additional ground for the doctrine. Thus, in United States v. Addyston Pipe & Steel Co., 54 U. S. App. 723, 743; s. c., 85 Fed. Rep. 271, 279 (6th Cir., 1898); Alger v. Thacher, 19 Pick. (Mass.) 51 (1837); Taylor v. Blanchard, 13 Allen (Mass.), 370 (1866); Skrainka v. Scharringhausen, 8 Mo. App. 522 (1880); Newell v. Meyendorff, 9 Mont. 254; s. c., 23 Pac. Rep. 333 (1890); Milwaukee Masons & Builders' Assoc. v. Niezerowski, 95 Wis. 129; s. c., 70 N. W. Rep. 166 (1897); Chapin v. Brown, 83 Iowa, 156; s. c., 48 N. W. Rep. 1074 (1891); Talcott v. Brackett, 5 Ill. App. 60,

very recently, the doctrine would have been applied so as to hold illegal the withdrawal (without limit as to time or space) of one out of a thousand trade competitors in a given city, notwithstanding that the continuance of the other nine hundred and ninety-nine would have effectually prevented the danger of monopoly. On the other hand, it would (as modified with reference to space) have been commonly applied to hold legal the withdrawal of nine hundred and ninety-nine such competitors from carrying on their trade within a given city;[1] while such withdrawal, though valid under the technical doctrine as to space limit, would be contrary to the present doctrine against trade monopolies. Nevertheless, and conspicuously in applying the test of *space limit*,[2]

67 (1879); Eastern Express Co. v. Meserve, 60 N. H. 198 (1880); Bishop v. Palmer, 146 Mass. 469; s. c., 16 N. E. Rep. 299 (1888). In United States Chemical Co. v. Provident Chemical Co., 64 Fed. Rep. 946 (Cir. Ct. Mo., 1894), it is even said that "the substantial ground *in all cases*, especially where corporations are concerned, is that such contracts tend to create monopolies." Compare Lufkin Rule Co. v. Fringeli, — Ohio St. —; s. c., 49 N. E. Rep. 1030 (1898).

[1] See, for instance, Kellogg v. Larkin, 3 Pinney (Wis.), 123, 142 (1851), note 2, p. 115, below, and cases cited in Greenhood on Public Policy, p. 709.

[2] The total inapplicability of the test of space limit to monopolies, was clearly seen in Nester v. Continental Brewing Co., 161 Pa. St. 473; s. c., 29 Atl. Rep. 102 (1894), where a combination to prevent competition within the city of Philadelphia and the county of Camden, N. J., was held illegal, against the objection that the restraint was but partial. The court say: "It is obviously immaterial whether the restraint be general or partial. The application of the rule does not depend upon the number of those who may be implicated, nor the extent of space included, in the combination; but upon the existence of injury to the public. One combination consisting of but part of those engaged in a given branch of trade, may amount to a practical monopoly; while another, less extensive in its scope, may, as well, bring disaster in its train. The difference lies only in degree, but equally forbids the aid of courts." Similarly the test of space limit was rejected in Texas Standard Oil Co. v. Adoue, 83 Tex. 650, 660; s. c., 19 S. W. Rep. 274 (1892). But the following are instances of acts held legal, where the court might have decided them to be illegal as creating monopolies, had it not been for the confusion of thought produced by applying the test of space limit. In Skrainka v. Scharringhausen, 8 Mo.

the view has been frequently expressed or acted upon that the doctrine against trade monopolies is based on that against contracts in restraint of trade.[1] This misstatement is com-

App. 522, 527 (1880), an agreement among twenty-four proprietors of stone-quarries in a portion of St. Louis, providing for the sale of all the rubble building-stone of such quarries by a common agent for a period of six months at prices fixed by the agreement, was sustained. By its terms the agreement was designed to prevent the depression of prices resulting from competition, making it impossible to work quarries at a profit. The court say: "The partial nature of the restraint in the case before us seems to be not colorable, but real. The agreement is amongst the quarrymen of one district of one city, and it does not appear that it embraces all of them. . . . *It is limited both as to time and place;* and we know of no case in recent times in which such a contract such as the one before us has been declared illegal." So in San Diego Water Co. v. San Diego Flume Co., 108 Cal. 549; s. c., 41 Pac. Rep. 495 (1895), a contract restraining competition in the business of supplying water to a city was held valid, as only partial, being confined to such city. A striking instance to similar effect is Kellogg v. Larkin, 3 Pinney (Wis.), 123, 142 (1851), where recovery was allowed on a lease of a warehouse, though, to the knowledge of the plaintiff, executed in furtherance of an agreement between proprietors of six wheat mills on the one hand, and the proprietors of twelve warehouses on the other, whereby the warehousemen were to give the former "full, absolute and uninterrupted control of the Milwaukee wheat market, so far as they shall be able to do so by virtue of their capacity as warehousemen or vessel and dock owners." The court say: "The restraint it imposed upon trade, if any, was partial and limited; limited in every particular referred to in the books. It was limited as to persons, as to object, as to place and as to time (though this last is not essential). As to persons, it was limited to the proprietors of eleven (twelve) warehouses; as to object it was limited to the traffic in wheat; as to place, it was limited to the Milwaukee market; and as to time, to a period of about seven months." Compare Herriman v. Menzies, 115 Cal. 16; s. c., 46 Pac. Rep. 730 (1896).

[1] Thus, in Morris Run Coal Co. v. Barclay Coal Co., 68 Pa. St. 173, 184 (1871); Craft v. McConoughy, 79 Ill. 346 (1875); Central Ohio Salt Co. v. Guthrie, 35 Ohio St. 666 (1880); More v. Bennett, 140 Ill. 69; s. c., 29 N. E. Rep. 888 (1892); Strait v. National Harrow Co., 18 N. Y. Suppl. 224 (Supm. Ct., Sp. T., 1891); National Harrow Co. v. Hench, 55 U. S. App. 53; s. c., 83 Fed. Rep. 36 (3d Cir., 1897); United States v. Addyston Pipe & Steel Co., 54 U. S. App. 723, 761; s. c., 85 Fed. Rep. 271, 291 (6th Cir., 1898; a conspicuous illustration, in view of the

paratively harmless where the same result would be reached whichever doctrine be applied. But it is otherwise where a transaction that should be held illegal according to the doc-

elaborate discussion of authorities). See also Milwaukee Masons & Builders' Assoc. v. Niezerowski, 95 Wis. 129; s. c., 70 N. W. Rep. 166 (1897); Urmston v. Whitelegg, 63 L. T. R. (N. S.) 455 (1890); Dueber Watch-case Manuf. Co. v. Howard Watch & Clock Co., 35 U. S. App. 16, 26; s. c., 66 Fed. Rep. 637, 643 (2d Cir., 1895), and cases cited in note 1, p. 118, below. On the other hand, the distinction between these doctrines has been apprehended by some courts. Thus, in National Benefit Co. v. Union Hospital Co., 45 Minn. 272; s. c., 47 N. W. Rep. 806 (1891), where a contract between two corporations was sustained as not illegal as *in restraint of trade*, the court say: "Neither one nor both of these companies have any exclusive right to engage in this business, it being one open to all. Hence this contract does not and cannot create any *monopoly*. The most that can be claimed against it is that it reduces by one the number of competitors." So, in Diamond Match Co. v. Roeber, 106 N. Y. 473, 483; s. c., 13 N. E. Rep. 419 (1887), it is said: "To the extent that the contract prevents the vendor from carrying on the particular trade, it deprives the community of any benefit it might derive from his entering into competition. But the business is open to all others, and there is little danger that the public will suffer harm from lack of persons to engage in a profitable industry. Such contracts do not create monopolies. They confer no special or exclusive privilege. If contracts in general restraint of trade, where the trade is general, are void as tending to monopolies, contracts in partial restraint, where the trade is local, are subject to the same objection, because they deprive the local community of the services of the covenantor in the particular trade or calling, and prevent his becoming a competitor with the covenantee." Compare Barber Asphalt Paving Co. v. Brand, 7 N. Y. Suppl. 744 (Supm. Ct., Gen. T., 1889). The distinction may not have been fully apprehended in Re Corning, 51 Fed. Rep. 205, 210 (D. Ct. Ohio, 1892), where an indictment, although under the Federal anti-trust act which forbids *monopolizing*, was held insufficient, the court applying the doctrine against contracts in restraint of trade, saying: "In what respect did the sales made as charged restrain trade *or monopolize* the traffic? . . . It is not averred that when defendants purchased their seventy distilleries, they obligated the vendors not to build other distilleries, or not to continue in the distillery business in the future. It is not averred that defendants attempted in any way to bind the vendors to withhold their capital or skill or experience in the business from the public in the future. There is no averment that the defendants in any manner or at any time at-

trine against monopolies, is upheld by applying that against contracts in restraint of trade. A further serious result of the failure to observe the distinction is seen in statutory pro-

tempted to control the business of the remaining one-fourth of the distilleries in the United States, or in any way attempted to limit their output, or by agreement with them control the price at which their products should be sold, or in any degree restrain their trade, or limit the territory over which their trade should extend. The full scope of the averments in this respect is that before this law was passed by Congress the defendants legally purchased with their own capital three-fourths of the distilleries in the United States, and that they produced 77,000,000 gallons of distillery products, and sold these products in the markets of the several States at the best possible prices; and that they continued so to own and operate said distilleries and so to sell their products after the passage of this act. This they did without any attempt at any time by contract to control the production of the other distilleries or the prices at which they should sell, or without any contract with such distillers in any way restraining trade." So, in Dolph v. Troy Laundry Machinery Co., 28 Fed. Rep. 553 (Cir. Ct. N. Y., 1886), an agreement between two manufacturers of washing-machines, they being the principal, but not the only, manufacturers in this country, for a division of profits on sales, upon the basis of a fixed price, was held not illegal. In Master Stevedores' Assoc. v. Walsh, 2 Daly, 1, 14 (1867), was sustained a by-law of an association of master stevedores, providing for *fixing prices* for which members should work. The question whether this was void as tending to prevent competition, was not discussed beyond a statement that the by-law was "not in restraint of trade, for it imposes no restraint upon one party which is not beneficial to the others, and is not prejudicial to the interests of the public." To what extent the members of the association controlled the business in the locality of their operations does not, however, appear. In Leslie v. Lorillard, 110 N. Y. 519, 534; s. c., 18 N. E. Rep. 363 (1888), an agreement between two rival steamboat companies by which one discontinued business, was sustained. It would seem from the statement of facts that the agreement was between the only two steamboat companies running between New York and certain ports in Virginia. The agreement seems to have resulted in a practical monopoly, and it seems difficult to sustain the decision, in view of later ones, even in New York. See comments on this decision in United States v. Addyston Pipe & Steel Co., 54 U. S. App. 723, 752; s. c., 85 Fed. Rep. 271, 285 (6th Cir., 1898). The court (in Leslie v. Lorillard) ask: "How is the result different from the simpler case of the sale by an individual of his business and his right to conduct it in

hibitions intended to include monopolies merely, but actually including such contracts in restraint of trade as in no sense are monopolies.[1] It may indeed be that the test of reason-

a particular part of the land?" The answer, of course, is that in the case supposed the agreement does not, necessarily at least, result in a monopoly. This decision is the more surprising in view of the circumstance that in Diamond Match Co. v. Roeber, 106 N. Y. 478; s. c., 13 N. E. Rep. 419 (1887), the same court had so clearly recognized the distinction between the doctrines. See, as to application to "trusts," of rules governing contracts in restraint of trade, article by A. M. Eaton in 4 Harv. Law Rev. 128 (1890).

[1] Thus, so far as the Federal anti-trust act has had any effect, it has, as a rule, been with reference, not to "trusts," or other mere restrictions upon competition, but to contracts in restraint of "trade" or "commerce." Thus, it is said in United States v. Trans-Missouri Freight Assoc., 166 U. S. 290, 326; s. c., 17 Supm. Ct. Rep. 540 (1897): "While the statute prohibits all combinations in the form of trusts or otherwise, the limitation is not confined to that form alone. *All combinations which are in restraint of trade* or commerce are prohibited, whether in the form of trusts or in any other form whatever." It was here held applicable to an agreement among competing *railroad corporations* for the maintenance of traffic rates, with a provision for payment of a penalty by a defaulting corporation (166 U. S. 313). So notwithstanding the provisions of the Interstate Commerce Act (p. 314). The court say (p. 341): "Although the parties have a right to withdraw from the agreement on giving thirty days' notice of a desire so to do, yet while in force, and assuming it to be lived up to, there can be no doubt that its direct, immediate and necessary effect is to put a restraint upon trade or commerce as described in the act." For elaborate criticisms of this decision, see Stickney's "State Control of Trade and Commerce;" also article by G. S. Patterson in 36 Am. Law Reg. & Rev. 307 (1897). See also, as to combinations to fix rates, Mannheim Ins. Co. v. Erie & Western Transp. Co., — Minn. —; s. c., 75 N. W. Rep. 602 (1898). In United States v. Addyston Pipe & Steel Co., 54 U. S. App. 723; s. c., 85 Fed. Rep. 271 (6th Cir., 1898; for facts, see § 20, p. 110, above), the circumstance that the parties to the agreement controlled the supply of the goods in question, seems immaterial to the decision, in view of the prohibition against contracts, etc., in restraint of trade or commerce, without any reference to restrictions upon competition. Had it been necessary to base the decision on the prohibition of § 2 of the act against *monopolizing* such trade or commerce, the circumstance that they so controlled the supply would have been material. In United States v. Trans-Missouri Freight Assoc., the restriction related to

ableness will be ultimately adopted as applicable to monopolies, or acts tending to produce a monopoly; but even so, it

rates of transportation; but in United States v. Coal Dealers' Assoc., 85 Fed. Rep. 252, 262 (Cir. Ct. Cal., 1898), the rule was held equally applicable to invalidate a restriction relating to the price of articles of commerce (in this case coal). The court say: "The clear and positive purpose of the statute must be understood to be that trade and commerce within the jurisdiction of the Federal government shall be absolutely free, and no contract or combination will be tolerated that impedes or restricts their natural flow and volume." To similar effect, United States v. Addyston Pipe & Steel Co., 54 U. S. App. 723, 741; s. c., 85 Fed. Rep. 271, 278 (6th Cir., 1898). As to the limitation of the scope of the provisions of the act to interstate, etc., dealings, see § 20, and as to its application to *reasonable* as well as unreasonable restraints, see § 22. In United States v. Trans-Missouri Freight Assoc., above (166 U. S. 329), the question is raised, though not decided, whether the prohibition does not extend even to the ordinary contract of a vendor not to engage in business. In United States v. Addyston Pipe & Steel Co., above (54 U. S. App. 767), where the prohibition was held to apply to an agreement not to make a contract for the sale and delivery of goods, the reasoning would seem applicable to such a contract of a vendor. Compare Gates v. Hooper, p. 120, below; and see Lufkin Rule Co. v. Fringeli, — Ohio St. —; s. c., 49 N. E. Rep. 1030 (1898). But in Brett v. Ebel, 29 N. Y. App. Div. 256; s. c., 51 N. Y. Suppl. 573 (1898), it was held not to apply to such a contract of a vendor.

The prohibition of the Texas act includes combinations "to create or carry out *restrictions in trade*," as well as "to prevent competition." It would seem that combinations have been held illegal under this provision, that would not, necessarily at least, have been so held under the mere prohibition against restrictions upon competition. Thus, in Texas & Pacific Coal Co. v. Lawson, 89 Tex. 394; s. c., 34 S. W. Rep. 919 (1896); reversing 10 Civ. App. 491; s. c., 31 S. W. Rep. 843 (1895), and holding void a lease of a saloon by a coal company, it to receive a share of the profits, and agreeing not to permit any other saloon to do business on its lands during the term of the lease; that it would pay its employees in checks instead of money, and redeem weekly such of the checks as the lessee might take in for liquors sold. It was intimated, however, that the restriction upon competition thus created, would have been illegal on common-law grounds. See previous decision in 32 S. W. Rep. 871 (1895). So in Fuqua v. Pabst Brewing Co., 90 Tex. 298; s. c., 38 S. W. Rep. 29 (1897), of an agreement for the sale of beer by a brewing company, it being provided that, during the performance of the contract, the company would not sell or consign any beer of its manufacture to any other party at Amarillo, Texas

will not be necessary to resort for such test to the doctrine against contracts in restraint of trade.[1]

§ 22. Test of legality of restriction upon competition.— We have already seen that the doctrine condemning monop-

(where the buyer transacted business), and that the buyer would neither sell nor be interested in the sale of any beer not manufactured by the company; the company to erect a cold-storage house and allow the buyer the free use of the same. To similar effect: Texas Brewing Co. v. Templeman, 90 Tex. 277; s. c., 38 S. W. Rep. 27 (1896); Texas Brewing Co. v. Meyer, — Tex. Civ. App. —; s. c., 38 S. W. Rep. 268 (1896). And see Texas Brewing Co. v. Anderson, — Tex. Civ. App. —; s. c., 40 S. W. Rep. 787 (1897); Texas Brewing Co. v. Durrum, — Tex. Civ. App. —; s. c., 46 S. W. Rep. 880 (1898). And so in Gates v. Hooper, — Tex. Civ. App. —; s. c., 39 S. W. Rep. 186 (1897), of an ordinary vendor's agreement to retire from business. The decision last cited was, however, reversed in 90 Tex. 563; s. c., 39 S. W. Rep. 1079 (1897), on the ground that there was no "combination" within the meaning of the statute. s. p., Erwin v. Hayden, — Tex. Civ. App. —; s. c., 43 S. W. Rep. 610 (1897). Compare United States v. Trans-Missouri Freight Assoc., p. 119, above. An agreement by the purchaser of property not to compete in business with the vendor, was held not within the Michigan anti-trust act of 1889. Hitchcock v. Anthony, 54 U. S. App. 439; s. c., 83 Fed. Rep. 779 (6th Cir., 1897).

The prohibition in the Federal anti-trust act includes contracts, etc., in restraint of not merely *trade*, but *commerce*. In United States v. Patterson, 55 Fed. Rep. 605, 639 (Cir. Ct. Mass., 1893), these words were held synonymous. But in United States v. Coal Dealers' Assoc., 85 Fed. Rep. 252, 265 (Cir. Ct. Cal., 1898), the word "commerce" is declared to have a broader meaning, the court saying: "Commerce among the States consists of intercourse and traffic between their citizens, and includes the transportation of persons and property, and the navigation of public waters for that purpose, as well as the purchase, sale and exchange of commodities." To same effect, United States v. Cassidy, 67 Fed. Rep. 698, 705 (D. Ct. Cal., 1895); Re Grand Jury, 62 Id. 840 (D. Ct. Cal., 1894); Re Grand Jury, Id. 834 (D. Ct. Cal., 1894); United States v. Debs, 64 Fed. Rep. 724, 749 (Cir. Ct. Ill., 1894). The word "trade," as used in the Kansas act of 1889, was held to include the business of insurance. Matter of Pinkney, 47 Kan. 89; s. c., 27 Pac. Rep. 179 (1891); State v. Phipps, 50 Kan. 609; s. c., 31 Pac. Rep. 1097 (1893); but, as used in the Texas act of 1889, to be synonymous with "traffic," and not to include the business of insurance. Queen Ins. Co. v. State, 86 Tex. 250, 264; s. c., 24 S. W. Rep.

[1] See § 22.

olies, originally confined to those created by the crown, now extends to some, but not all, monopolies, or other restrictions upon competition, created by the acts of private parties.[1] Leaving now out of consideration decisions that deny *in toto* the propriety of such extension of the doctrine, we note that the decisions recognizing the propriety of such extension to *some* restrictions upon competition, seem capable of classification as applying one or the other of two different tests, which we may term *the test of extent* and *the test of reasonableness*. We first consider the test of extent. We have already seen that a partnership, in a small community at least, may be legal, though having a monopoly of its line

397 (1898; the contract of insurance being declared not to be an "article of commerce" or a "commodity" under the act); but to include dealing in liquors. Texas & Pacific Coal Co. v. Lawson, 89 Tex. 394; s. c., 34 S. W. Rep. 919 (1896). As used in the Kansas act, it was held to mean *domestic*, as distinguished from interstate, trade. State v. Phipps, above. The prohibition of the Federal act was held in United States v. Workingmen's Amalgamated Council, 54 Fed. Rep. 994, 999 (Cir. Ct. La., 1893), to apply to a combination composed of laborers acting in the interest of laborers. The court say: "The combination, setting out to secure and compel the employment of none but union men in a given business, as a means to effect this compulsion, finally enforced a discontinuance of labor in all kinds of business, including the business of transportation of goods and merchandise which were in transit through the city of New Orleans from State to State and to and from foreign countries." It was held to apply to interference with interstate commerce and the transportation of the mails, in United States v. Elliott, 62 Fed. Rep. 801 (Cir. Ct. Mo., 1894); Same v. Same, 64 Fed. Rep. 27 (Cir. Ct. Mo., 1894); United States v. Agler, 62 Fed. Rep. 824 (Cir. Ct. Ind., 1894); United States v. Debs, 64 Fed. Rep. 724 (Cir. Ct. Ill., 1894); United States v. Cassidy, 67 Fed. Rep. 698, 705 (Cir. Ct. Cal., 1895). Compare Arthur v. Oakes, 24 U. S. App. 239, 269; s. c., 63 Fed. Rep. 310, 329 (7th Cir., 1894). The question was left open in Re Debs, 158 U. S. 564, 600; s. c., 15 Supm. Ct. Rep. 900 (1895), where the decision was based on the general power of a court of equity, independently of statute, to restrain, on the application of the government, interference with interstate commerce and the transportation of the mails. So the prohibition was held to apply to a boycott, in Thomas v. Cincinnati, N. O. & T. P. Ry. Co., 62 Fed. Rep. 803, 821 (Cir. Ct. Ohio, 1894.

[1] See § 19.

of business in that community, and though having secured such monopoly as a result of efforts to drive all competitors from the field.[1] It is difficult, if not impossible, to draw a sharp line of distinction between such a combination and a combination of scores of dealers in meat, groceries or clothing, or of builders, having a monopoly of its line of business in a large community or set of large communities, and though having secured such monopoly as a result of efforts to drive all competitors from the field. Yet such a combination is, according to the doctrine prevailing in this country, illegal. It being impossible, then, to establish a distinction as to kind, we seem compelled to resort to a distinction as to degree. But there seems as yet to be no general recognition of any precise line of distinction.[2] Many of the decisions appear to go no further than the recognition, not always clear, of a rough distinction between a restriction on a large scale and a restriction on a small scale.[3] But there would seem to be logical ground for the establishment of a general rule that *any restriction upon competition is illegal, if resulting or tending to result in the control of a substantial portion of the commodity in question.* This we may term *the test of extent.* Its application must necessarily depend much on the circumstances of the particular case.[4] But

[1] See § 19.

[2] Though it seems to have been applied to mere agreements to fix price. See § 27.

[3] Thus, in People v. North River Sugar Refining Co., 54 Hun, 354, 370; s. c., 7 N. Y. Suppl. 406 (1889), where the restriction condemned was very extensive, the court say: "All the cases, ancient and modern, agree that a combination, the tendency of which is to prevent *general* competition and to control prices, is detrimental to the public, and consequently unlawful." But in Coquard v. National Linseed Oil Co., 171 Ill. 480, 484; s. c., 49 N. E. Rep. 568 (1898), an allegation that a corporation "had acquired a great many oil mills and plants, and was managing a large business," was held insufficient to show that it was a "trust." It is said by S. C. T. Dodd, 7 Harv. Law Rev. 157, 159 (1893), that "the word 'monopoly,' not only as popularly used, but as ordinarily used in legal decisions, means only a large business."

[4] The following seem to be properly classed as cases where, in determining the legality of restric-

there is observable a strong tendency to apply, instead of the test of extent, what we may term *the test of reasonableness.*

tions, the test of extent was applied, though, as intimated in the text, this is not commonly recognized therein as the precise test. Except as otherwise expressly indicated, the restrictions were held illegal. For convenience of reference they are arranged according to States, following the Federal decisions. With reference to the English decisions, as has been already intimated, so far as they hold such restrictions illegal, it seems to be according to the test of reasonableness rather than that of extent. Hilton v. Eckersley, 6 El. & Bl. 47 (1855), has sometimes been referred to as an authority for condemning such restrictions, but the element of tendency of the combination there under consideration to restrict competition, did not enter into the case, which was decided on entirely different grounds. (For facts see § 7, p. 27.)

FEDERAL: Agreements among three corporations owning or controlling all the railroads in Colorado and northern New Mexico, providing for division of the country, allotting to each party a portion for the purpose of building new roads, also that neither would "voluntarily connect with or take business from or give business to any railroad" to be thereafter constructed in the territory of the other. Denver & N. O. R. Co. v. Atchison, T. & S. F. R. Co., 15 Fed. Rep. 650, 655 (Cir. Ct. Colo., 1883). Agreement among different corporations and individuals engaged in the business of manufacturing and selling gelatine shells and capsules, to pool their interests and form a new corporation. Merz Capsule Co. v. United States Capsule Co., 67 Fed. Rep. 414 (Cir. Ct. Mich., 1895; under Michigan anti-trust act of 1889). An "exchange," the purpose of which was to control and monopolize the entire business of buying and selling live-stock at the Kansas City stock-yards, the extent of which is thus indicated: "Said yards, with perhaps the exception of the yards at Chicago, are the largest in the country, and handle great numbers of live-stock. These yards, the packing-houses, and this exchange, are all situated at the gateway through which flows the great stream of commerce of several States and Territories, and, among all the business tributary to this locality, probably none is as important as the live-stock business, and the various industries connected therewith." United States v. Hopkins, 82 Fed. Rep. 529, 535 (Cir. Ct. Kan., 1897; under Federal anti-trust act). Combination to fix the price of coal, the parties thereto controlling the supply used in San Francisco for domestic purposes as a fuel. United States v. Coal Dealers' Assoc., 85 Fed. Rep. 252 (Cir. Ct. Cal., 1898; under Federal anti-trust act). Scheme whereby twenty-two different persons, firms or corporations manufacturing and selling at least ninety per cent. of the "float spring tooth harrows" made in the

Any restriction, legal according to the test of extent, would probably be held legal according to the test of reasonable-

country, assigned to a corporation formed for the purpose, all United States letters patent then respectively owned or thereafter to be acquired by them relating to such harrows, the corporation to issue to each member of the combination exclusive licenses to manufacture and sell, at uniform prices and upon the same terms, on its own account, the style of harrow that he had been making, each licensee being forbidden to manufacture or sell other than his own specific form of harrow. National Harrow Co. v. Hench, 76 Fed. Rep. 667 (Cir. Ct. Pa., 1896); affirmed in 55 U. S. App. 53; s. c., 83 Fed. Rep. 36 (3d Cir., 1897; action by corporation against licensees for enforcement of contracts). The same result had been reached in like suits by the same corporation, in National Harrow Co. v. Quick, 67 Fed. Rep. 130 (Cir. Ct. Ind., 1895); National Harrow Co. v. Bement, 21 N. Y. App. Div. 290; s. c., 47 N. Y. Suppl. 462 (1897). In the case last cited, however, the decision was based on the provision of the New York statute (L. 1892, ch. 688, § 7) forbidding a stock corporation to combine "for the creation of a monopoly, or the unlawful restraint of trade, or for the prevention of competition in any necessary of life." The same result (as in National Harrow Co. v. Hench, above) had also been reached in an action against the same corporation to be relieved from the agreement. Strait v. National Harrow Co., 18 N. Y. Suppl. 224 (Supm. Ct., Sp. T., 1891). As to effect of patents being involved, see § 18. In American Biscuit & Manuf. Co. v. Klotz, 44 Fed. Rep. 721 (Cir. Ct. La., 1891), doubts were expressed as to the legality of a combination that had secured the control and pooled the business of thirty-five of the leading bakeries in twelve States.

CALIFORNIA: In People ex rel. v. American Sugar Refining Co., 7 Ry. & Corp. L. J. 83 (Super. Ct. San Francisco, 1890), was condemned the combination also condemned in People v. North River Sugar Refining Co. (see under NEW YORK).

CONNECTICUT: In State v. Hartford & New Haven R. R. Co., 29 Conn. 538 (1861), the decision was based upon the failure of a railroad corporation to perform a corporate duty, though the circumstance that such failure resulted in the creation of a monopoly, was touched upon.

GEORGIA: In Central R. R. Co. v. Collins, 40 Ga. 582, 631 (1869), the question really was as to the power of a railroad corporation to acquire stock in another, for the purpose of controlling its management. But some stress is laid on the circumstance that the sole object of the arrangement was to prevent the *ruinous competition* that the corporation, whose stock was sought to be acquired, had entered into, and was contrary to public policy. Compare Hazlehurst v. Savannah, etc. R. R. Co., 43 Ga. 13, 57 (1871).

ILLINOIS: Agreement among the proprietors of four grain houses, controlling the business in a cer-

ness. But the application of the test of reasonableness has resulted in holding legal many restrictions that would have been

tain town, for fixing prices and a division of profits. Craft v. McConoughy, 79 Ill. 346 (1875). Agreement by a corporation having the power to supply gas in any part of Chicago, not to supply another corporation within a certain portion. This might have rested on the ground that the corporation could not abandon a public duty; but it is also said: "The contract between these corporations tends to create and perpetuate a monopoly in the furnishing of gas to the city, and is, therefore, against public policy." Chicago Gas-light & Coke Co. v. People's Gas-light & Coke Co., 121 Ill. 530, 544; s. c., 13 N. E. Rep. 169 (1887). Holding by a company formed to manufacture and sell gas, of a majority of the stock of the only other four gas companies in Chicago, it having a capital stock of $25,000,000, they of nearly $17,000,000. The decision might, however, have rested on the ground of the absence of express statutory authority to so hold stock. People ex rel. v. Chicago Gas Trust Co., 130 Ill. 268, 292; s. c., 22 N. E. Rep. 798 (1889). Corporation having fifteen hundred members, and thus described: "Appellee receives milk from members, and accounts to them for the same; guarantees to members payment for milk sold by it; fixes and determines the price of milk; retains five cents upon each can of milk sold, for each year; has authority over all milk consigned by any of its members to any stand within the corporate limits of the city of Chicago; a member cannot sell his stock except to a shipper and producer of milk, and must own as many shares as he ships cans of milk per day, but not to own more than fifty shares of stock." Ford v. Chicago Milk Shippers' Assoc., 155 Ill. 166; s. c., 39 N. E. Rep. 651 (1895; under Illinois anti-trust act of 1891). "Trust" agreement, for description of which see § 26. There is, however, nothing in the agreement, or indeed in the report of the case, to show that those engaged in this combination constituted a controlling interest in the preserving business. So far as appears, they may have constituted but an insignificant portion. Probably the court was unconsciously influenced by the common rumor concerning the nature of the combination. Bishop v. American Preservers' Co., 157 Ill. 284, 311; s. c., 41 N. E. Rep. 765 (1895). Combination among those manufacturing and selling ninety-five per cent. of all the paper cigarettes consumed in the United States. People ex rel. v. American Tobacco Co., 2 Chicago L. J. Weekly, 249 (Cook Co. Cir. Ct., 1897?). Huston v. Reutlinger (see under KENTUCKY) was followed in a similar case, People ex rel. v. Chicago Live Stock Exchange, 170 Ill. 556; s. c., 48 N. E. Rep. 1062 (1897), holding illegal a by-law of an exchange of live-stock commission merchants, creating restrictions as to the number, kind and compensation of solicitors to be employed by members.

held illegal under the test of extent. It is to be noted that courts adopting the test of reasonableness have commonly,

IOWA: Agreement among the grocerymen in a certain town, not to engage in the butter business, so as to enable one firm to have a monopoly of that business. Chapin v. Brown, 83 Iowa, 156; s. c., 48 N. W. Rep. 1074 (1891).

KANSAS: Combination held illegal under the Kansas act (L. 1891, ch. 158) directed against restrictions upon the sale of live-stock. Greer v. Payne, 4 Kan. App. 153; s. c., 46 Pac. Rep. 190 (1896).

KENTUCKY: Agreement between proprietors of steamboats, rivals in the freight and passenger trade on the Kentucky river, for a division of net profits, in order to prevent the rivalry between them, though there was no agreement as to charges. It would seem, though not distinctly stated, that this arrangement resulted in a complete monopoly. Anderson v. Jett, 89 Ky. 375; s. c., 12 S. W. Rep. 670 (1889). In Huston v. Reutlinger, 91 Ky. 333; s. c., 15 S. W. Rep. 867 (1891), an injunction was granted against the enforcement by an association of underwriters, of by-laws imposing restrictions upon its members as to the number of solicitors they might employ, the time of employment, compensation to be paid, and forbidding them to contract with a solicitor, so as to make his pay depend on the number of risks he procured, and forbidding an employment of a solicitor who had severed his connection with another member. It seems a sufficient ground for the decision that the by-laws were unauthorized by the fundamental law of the association, but the court unnecessarily, as it seems to us, adduce the further ground that they created unlawful restrictions upon competition. It does not appear to what extent the association controlled the business in question.

LOUISIANA: Agreement among eight firms in New Orleans, holding seven thousand four hundred and ten bales of India cotton bagging, not during three months to sell any of it without the consent of the majority. Nothing appears, however, to show how large a portion of the supply these bales constituted. India Bagging Assoc. v. Kock, 14 La. Ann. 168 (1859). Agreement among competing railroad corporations to divide their earnings from competition. Texas & Pacific Ry. Co. v. Southern Pacific Ry. Co., 41 La. Ann. 970, 980; s. c., 6 So. Rep. 888 (1889).

MASSACHUSETTS: In Taylor v. Blanchard, 13 Allen, 370 (1866), an agreement not to manufacture and sell shoe cutters in Massachusetts was held non-enforceable at the suit of a person who was one of four in the State to whom the business was confined.

NEBRASKA: "Trust" agreement (the "Distillers' & Cattle Feeders' Trust") not only to limit the production of alcohol, but to dismantle as many distilleries as the trust might see fit. State v. Nebraska Distilling Co., 29 Neb. 700; s. c., 46 N. W. Rep. 155 (1890).

but needlessly, attempted to base it on the doctrine that contracts in restraint of trade are valid if reasonable, proceed-

NEW HAMPSHIRE: See Currier v. Concord R. R. Co., 48 N. H. 321 (1869); Morrill v. Boston & Maine R. R., 55 N. H. 531 (1875), as to New Hampshire statute against railroad monopolies.

NEW JERSEY: Agreements that, if enforced, would have secured the control of the production of three-fourths of the sanitary ware produced in the United States. Trenton Potteries Co. v. Oliphant, — N. J. Eq. —; s. c., 39 Atl. Rep. 923, 945 (1898). In Elkins v. Camden & Atlantic R. R. Co., 36 N. J. Eq. 5,14 (1882), the purchase by a railroad corporation of the stock and bonds of a rival road, was held to be "clearly *ultra vires* as a purchase with a view to extinguishing competition." In Meredith v. N. J. Zinc & Iron Co., 55 N. J. Eq. 211; s. c., 37 Atl. Rep. 539 (1897), the legality of the consolidation of the business of rival corporations, owners of property containing zinc ores, was sustained, it appearing that the amount produced by the consolidated corporation constituted but a small fraction of the world's supply.

NEW YORK: Agreement among owners of several lines of competing canal boats, to fix the rates of freight and divide their net earnings. Hooker v. Vandewater, 4 Denio, 349 (1847; under statute, now Penal Code, § 168, subd. 6, forbidding conspiracy "to commit any act injurious to trade or commerce"). Followed in Stanton v. Allen, 5 Denio, 434 (1848), a case very similar as to facts. These two decisions are sought to be distinguished in Kellogg v. Larkin, 3 Pinney (Wis.), 123, 152 (1851), as based on conditions peculiar to canal transportation in the State of New York. This distinction avails little, in view of the extensive application that has been given to the doctrine of those cases. Agreement not to extend construction of railroad, the object being to prevent competition with another road. Hartford & New Haven R. R. Co. v. N. Y. & New Haven R. R. Co., 3 Robt. 411 (1865), which was distinguished in Ives v. Smith, 3 N. Y. Suppl. 645, 654; affirmed in 8 Id. 46 (Supm. Ct., Gen. T., 1889), where an agreement having reference to the future construction of railroads was sustained. Scheme to control the shipment and supply of coal for the Elmira market. Arnot v. Pittston & Elmira Coal Co., 68 N. Y. 558 (1877). As to means by which this was to be effected, see § 30. "Trust" agreement among seventeen corporations in different parts of the United States, engaged in the manufacture, refining and sale of sugar, leaving not more than six other companies or firms not engaged in the business. People v. North River Sugar Refining Co., 54 Hun, 354; s. c., 7 N. Y. Suppl. 406 (1889; under Penal Code, § 168, subd. 6; see Hooker v. Vandewater, above); affirmed on another ground in 121 N. Y. 582; s. c., 24 N. E. Rep. 834 (1890). See as to trust agreements generally, § 26. Agreement

ing on what we have seen to be the mistaken supposition

among brokers and dealers in sheep and lambs consigned to market in New York City and vicinity, to take effect at the same time with an agreement among butchers transacting business in the same locality; the brokers to sell only to the butchers, and the butchers to buy only from the brokers. Judd v. Harrington, 139 N. Y. 105; s. c., 34 N. E. Rep. 790 (1893). Combination comprising all the retail coal dealers in the city of Lockport, except one. People v. Sheldon, 139 N. Y. 251; s. c., 34 N. E. Rep. 785 (1893; sustaining conviction for conspiracy under Penal Code, § 168, subd. 6; see Hooker v. Vandewater, above). For an elaborate criticism of People v. Sheldon, see Stickney's "State Control of Trade and Commerce." Combination among dealers controlling ninety to ninety-five per cent. of the manufactured stock of bluestone sold in the State, and for the purpose of controlling the trade in New York City. Cummings v. Union Blue Stone Co., 15 N. Y. App. Div. 602; s. c., 44 N. Y. Suppl. 787 (1897). See, as to illegality of combination for control of business of manufacturing and selling carbons for electric lighting, Pittsburg Carbon Co. v. McMillin, 119 N. Y. 46; s. c., 23 N. E. Rep. 530 (1890). See Strait v. National Harrow Co., under Federal decisions.

OHIO: Agreement among all the salt manufacturers (with one or two exceptions) in a large salt-producing territory, and whose aggregate annual product was about 140,000 barrels, for the purpose of regulating the price and grade. Central Ohio Salt Co. v. Guthrie, 35 Ohio St. 666 (1880). Association of manufacturers of ninety-five per cent of all the star candles in that part of the United States east of the western boundary of Utah. Emery v. Ohio Candle Co., 47 Ohio St. 320; s. c., 24 N. E. Rep. 660 (1890). Agreement to establish a virtual monopoly of the business of producing petroleum and of manufacturing, refining and dealing in it and all its products, throughout the entire country. Here, where the facts were similar to those in People v. North River Sugar Refining Co. (see above), the court might, as in that case, have refrained from passing on the question of monopoly, and based its decision on the ground that the agreement subjected the corporation to an outside control inconsistent with its character as a corporation. State ex rel. v. Standard Oil Co., 49 Ohio St. 137; s. c., 30 N. E. Rep. 279 (1892). Association of all or nearly all the brick manufacturers and dealers in and about a certain place, formed to control the price. Jackson v. Akron Brick Assoc., 53 Ohio St. 303; s. c., 41 N. E. Rep. 257 (1895). In Crawford v. Wick, 18 Ohio St. 190 (1868), in an opinion strikingly picturesque as to language, was condemned an agreement by an employer to exercise his influence over his employees to induce them to deal solely with a third person, one of the grounds assigned being that it tended to

that the doctrine condemning restrictions upon competition

"unwarrantable monopoly." Compare Dionne v. New Iberia Refining, etc. Assoc., 50 La. Ann. —; s. c., 23 So. Rep. 624 (1898).

PENNSYLVANIA: Agreement among corporations controlling coal fields that constituted the great source of supply of bituminous coal to the State of New York and large territories westward, the purpose and effect being thus described: "These corporations represented almost the entire body of bituminous coal in the northern part of the State. By combination between themselves they had the power to control the entire market in that district. And they did control it by a contract not to ship and sell coal otherwise than as therein provided. And, in order to destroy competition, they provided for an arrangement with dealers and shippers of anthracite coal. They were thereby prohibited from selling under prices to be fixed by a committee representing each company. And they were obliged to suspend shipments upon notice from an agent that their allotted share of the market had been forwarded or sold." The court say: "The combination is wide in scope, general in its influence." Morris Run Coal Co. v. Barclay, 68 Pa. St. 173, 183, 184 (1871; under New York statute, now Penal Code, § 168, subd. 6; see Hooker v. Vandewater, above). Combination among forty-five brewers of Philadelphia, individuals, firms and corporations, to regulate and control the sale and price of beer within the city of Philadelphia and the county of Camden, New Jersey. Nester v. Continental Brewing Co., 161 Pa. St. 473; s. c., 29 Atl. Rep. 102 (1894).

TEXAS: Agreement among independent dealers in and purchasers of cotton seed, engaged separately in the business of manufacturing therefrom "oil, oil cake, and other products of cotton and cotton seed," in various cities in the State, such agreement not only fixing prices, but prohibiting one of the parties in particular from purchasing, handling or shipping, directly or indirectly, any cotton seed at many of the most important markets in the State, and binding it to deliver the entire product, "make or yield" from cotton seed of its mills, to the other party to the contract, in consideration of certain profits guarantied to it. Texas Standard Oil Co. v. Adoue, 88 Tex. 650; s. c., 19 S. W. Rep. 274 (1892). Agreement among dealers representing all the bulk or keg beer consumed in El Paso, to jointly control the supply of beer, to cease competition among themselves in respect to it, and to regulate the price thereof in El Paso. Anheuser-Busch Brewing Assoc. v. Houck, 27 S. W. Rep. 692 (Tex. Civ. App., 1894); affirmed as Houck v. Anheuser-Busch Brewing Assoc., in 88 Tex. 184; s. c., 30 S. W. Rep. 869 (1895; under Texas anti-trust act of 1889). In Waters-Pierce Oil Co. v. State, — Tex. Civ. App. —; s. c., 44 S. W. Rep. 936 (1898), so far as appears, the transactions held unlawful were merely agreements for exclusive

is based on that condemning contracts in restraint of trade.[1] This test of reasonableness opens up a wide and perhaps diffi-

dealing and selling at a fixed price, which certainly are not, considered by themselves, unlawful. The decisions in Texas, however, are generally based, not on the doctrine against restrictions upon competition, but on the statute forbidding *contracts in restraint of trade*. See § 21.

WISCONSIN: By-laws of association composed of about sixty of the seventy or seventy-five mason contractors in Milwaukee, the object being to suppress fair and free competition for building contracts in Milwaukee, it being provided that each member should submit any bid for a contract to the association, and that the lowest bidder should add six per cent. to the amount of his bid, before submitting it to the owner or architect. So the right to bid on changes or additions was limited to the original contractor, unless the amount was larger than the contract price. Milwaukee Masons & Builders' Assoc. v. Niezerowski, 95 Wis. 129; s. c., 70 N. W. Rep. 166 (1897).

[1] That this is the proper test was elaborately contended for in United States v. Trans-Missouri Freight Assoc., 19 U. S. App. 36; s. c., 58 Fed. Rep. 58 (8th Cir., 1893), where was involved the legality of an agreement entered into between fifteen independent and competing railroad companies, extensively engaged in interstate commerce in that part of the United States west of the Mississippi and Missouri rivers. The professed object of the agreement was "mutual protection, by establishing and maintaining reasonable rates, rules and regulations on all freight traffic, both through and local." Provision was made for the establishment of such rates, rules and regulations. It was found by the court that the rates maintained under the contract had not been unreasonable, and that many reductions had been made under its operation. (19 U. S. App. 67.) The whole discussion is confused by the introduction of the erroneous and needless assumption that the doctrine against restrictions upon competition is based on that against contracts in restraint of trade. It is said (p. 59): "It is not the *existence* of the restriction of competition, but the *reasonableness* of that restriction, that is the test of the validity of contracts that are claimed to be in restraint of trade." An attempt is made, though in our view unsuccessfully, to show that the authorities generally that condemn restrictions upon competition, are in harmony with this test; it being said (p. 57): "These decisions rest on the ground that the main *purpose* of the obnoxious contracts was to suppress competition, and that they thus *tended* to effect an unreasonable and unlawful restraint of trade." So also (p. 55): "The main *purpose* of contracts of these classes that are thus held illegal is to *suppress*, not simply to regulate, competition, and, if suppression is not effected, it is be-

cult field of inquiry. Some of what we may regard as tests subsidiary to this as the fundamental test, we shall consider

cause the contracts fail to accomplish their *purpose*. It is evident that there is a wide difference between such contracts and those the *purpose* of which is to so regulate competition so that it may be fair, open and healthy, and whose restriction upon it is slight, and only that which is necessary to accomplish this *purpose*. It does not necessarily follow that contracts of the latter class constitute illegal restraints of trade, because those of the former class do." This makes the authorities generally rest on the uncertain test of *intent*, as to which see § 2. This decision was reversed in 166 U. S. 290, 373; s. c., 17 Supm. Ct. Rep. 540 (1897), without necessarily affecting the soundness of the conclusions of the court below on this point, though the difficulties in the way of a judicial determination of what is a reasonable rate for railroad transportation, are forcibly pointed out.

But, although the decisions in this country, as a rule, apply the test of extent, yet, as we have already stated (§ 19, p. 101, above), the English decisions, so far as they recognize the doctrine condemning restrictions upon competition, seem to apply the test of reasonableness, rather than that of extent. In Collins v. Locke, 4 L. R. App. Cas. 674 (1879), an agreement among four individuals and firms carrying on the business of stevedores in the port of Melbourne, for parceling out the stevedoring business, *and preventing competition*, at least among themselves, "and it may be to keep up the price," was held not unlawful as in restraint of trade, *if carried into effect by proper means*. The question then was as to the means. However, the test of reasonableness or "propriety" was not applied to *the restriction itself*, the validity of which seems assumed, but to *the means*, the validity of which was determined by the rules applicable to contracts in restraint of trade. The decision strikingly shows how little foothold what we must regard as the American doctrine condemning restrictions upon competition arising from the acts of mere individuals, has obtained in England. It is pointed out in United States v. Addyston Pipe & Steel Co., 54 U. S. App. 723, 751; s. c., 85 Fed. Rep. 271, 285 (6th Cir., 1898), that it is at variance with many decisions in this country. The test of reasonableness seems to have been applied in Chicago, Milwaukee & St. Paul Ry. Co. v. Wabash, St. Louis & Pacific Ry. Co., 27 U. S. App. 1; s. c., 61 Fed. Rep. 993 (8th Cir., 1894), where an agreement among seven railroad companies, the Union Pacific, the Chicago, Rock Island & Pacific, the Chicago, Milwaukee & St. Paul, the Wabash, St. Louis & Pacific, the Chicago & Northwestern, the Chicago, St. Paul, Minneapolis & Omaha, and the Missouri Pacific, for a pooling and division of through traffic, was

separately elsewhere, but we here mention, by way of suggestion, others that have as yet received but little or no at-

held void as designed to establish rates *without reference to their reasonableness*. There was no evidence of the rates fixed for the traffic involved. This test might perhaps have been applied in Central Trust Co. v. Ohio Central Ry. Co., 28 Fed. Rep. 806 (Cir. Ct. Ohio, 1885), where a pooling contract among three railroad companies, having reference to their coal business, in respect to which they were competitors, and providing for division of business and earnings in certain fixed proportions, and for fixing the rates of transportation, was sustained as against a receiver of one of the companies. The decision was "without regard to the questions made as to the original validity of the contract." It appears, however, that the contract "afforded to shippers of coal along the lines of the railroads, rates of transportation as low, if not lower, than was charged by any other railroad companies in the State, quantities and distances being equal. The facilities afforded to shippers and the rates for transportation, were uniform and fixed for a definite period. They were not higher than had been charged the public under the sharpest competition existing before the contract was made."

The test was applied in United States v. Joint Traffic Assoc., 76 Fed. Rep. 895 (Cir. Ct. N. Y., 1896), sustaining an agreement among thirty-two railroad companies immensely engaged in competitive interstate commerce, fixing rates, fares and charges, providing for the division of competitive traffic and for the control of soliciting agents. The court say: "These provisions of the contract do not provide for lessening the number of carriers, nor their facilities; nor for raising their rates, except expressly by its terms not contrary to law, and therefore not beyond what are reasonable." So held notwithstanding the provisions of the Federal anti-trust act. But this seems opposed to United States v. Trans-Missouri Freight Assoc., above, and it may be said here generally, in view of that decision, that, so far at least as decisions in the Federal courts are concerned, the test of reasonableness is probably, even on common-law grounds, inapplicable to restrictions upon competition among railroad corporations. See § 25. This test was also applied in San Diego Water Co. v. San Diego Flume Co., 108 Cal. 549; s. c., 41 Pac. Rep. 495 (1895), sustaining an agreement between a "water company" that owned a complete distributing plant for furnishing water to the city of San Diego, and a "flume company" owning no distributing plant in the city, but water rights, reservoirs and a supply of water outside the city, connected with the distributing plant of the other. The agreement provided that the flume company should appoint the water company its sole agent for the exclusive sale of its water within the city, all

tention in the decisions,[1] such, for instance, as the distance of a given community from other communities, its means of

such sales to be subject to the approval of the flume company, two trustees, one selected from each of the companies, being invested with control of the properties within the city, and a distribution of profits being provided for. The city authorities had constitutional power to fix reasonable rates for water supplied to it. The court say (p. 559): "A monopoly is usually, though not necessarily, harmful or injurious to public interests, though, as that term is generally used, injury to the public is implied, and competition is therefore regarded as favorable to the public interest. But there is a competition which tends to monopoly, by driving out all but the stronger competitor, when prices are again increased so as not only to yield a profit upon the original investment, but to recoup the losses incurrred in breaking down competitors; or, where the competitors are of equal strength and tenacity of purpose, it may result in the destruction of the public service by the collapse of all of them." And again (p. 561): "Public policy does not condemn nor prohibit an arrangement intended to prevent a competition between these corporations, which would inevitably result in the financial ruin of one or both of them, and which could not, in any event, benefit the city or its inhabitants."

The test was also applied in Manchester & Lawrence R. R. v. Concord R. R., 66 N. H. 100, 127; s. c., 20 Atl. Rep. 883 (1890), where an agreement between two rival and competing railroad companies, having the purpose and effect of destroying and preventing competition, was sustained as valid, it not appearing that the purpose or effect was to raise the prices of transportation above a reasonable standard, or that the public were preju-

[1] See, for instance, Kellogg v. Larkin, 3 Pinney (Wis.), 123, 147 (1851), where an agreement to secure to certain parties the "control of the Milwaukee wheat market" was held not illegal as tending to "reduce the price of wheat below its actual market value," and the court say: "Wheat, being an article of almost universal consumption, has a market everywhere and a value in every market. And that value in any particular place is determined less by the number of purchasers in that place, than by its distance from and means of communication with the great central markets of the country and of the world." In United States v. Addyston Pipe & Steel Co., 54 U. S. App. 728, 750; s. c., 85 Fed. Rep. 271, 284 (6th Cir., 1898), it is intimated that the illegality of even a local monopoly is not removed by the circumstance that by reason of outside competition it is purely temporary. The court say: "The public interest may suffer severely while new competition is slowly developing." See comments therein on Wickens v. Evans, 3 Younge & J. 318 (1829).

communication therewith, the practicability of employing a substitute for the commodity the supply of which is monopolized, and so on.

diced by their operation in any manner. The court say: "The naked question presented then is, whether all contracts between rival railway corporations which prevent competition, are necessarily contrary to public policy, and therefore *mala prohibita* and illegal in themselves. To state this question is to answer it in the negative, because it is obvious that the answer depends upon circumstances. While without doubt contracts which have a direct tendency to prevent a healthy competition, are detrimental to the public, and consequently against public policy, it is equally free from doubt that when such contracts prevent an unhealthy competition, and yet furnish the public with adequate facilities, at fixed and reasonable rates, they are beneficial and in accord with sound principles of public policy. For the lessons of experience, as well as the deductions of reason, amply demonstrate that the public interest is not subserved by competition which reduces the rate of transportation below the standard of fair compensation; and the theory which formerly obtained, that the public is benefited by unrestricted competition between railroads, has been so emphatically disproved by the results which have generally followed its adoption in practice, that the hope of any permanent relief from excessive rates, through the competition of a parallel or rival road, may, as a rule, be justly characterized as illusory and fallacious." Of the case at bar it is said (p. 129): "The geographical location and relative resources of the two roads were such as to render it obvious that the plaintiffs could not reasonably hope successfully to compete with their more powerful rival. The alternatives presented, it may be safely assumed, were combination or ruinous competition." Of cases cited as showing the illegality of such a combination, it is said: "They are cases of contracts in restraint of mercantile business; or cases of contracts which attempt to derogate from the right of eminent domain inherent in the State; or cases where contracts between railroad companies were held contrary to public policy, because one of the parties attempted to bind itself not to perform duties incident to the legal character of common carriers or public servants; or cases where contracts between railroad companies were held contrary to public policy, because one of the parties agreed not to build, or to cease to operate, a road which they were chartered to build or operate; or cases where contracts between railroad companies have been held illegal merely on the ground that they were *ultra vires*."

The test was also applied in Ives v. Smith, 8 N. Y. Suppl. 645, 654; affirmed in 8 Id. 46 (Supm. Ct., Gen. T., 1889), where was sustained an

§ 23. Remote and permanent, as distinguished from immediate and temporary, effect of restriction upon competition.— Under the conditions of modern business it is rarely possible for a pure monopoly, or absolute restriction upon

agreement thus characterized: "The Oregon Railway & Navigation Company and the Northern Pacific Company have each the right to build branches in a great and widely-extended territory, unsettled, remote and undeveloped. The main lines of each company penetrate territory naturally tributary to them. From each of these main lines, branches or extensions from time to time become necessary, as the progress and development of the country may require. Instead of engaging in a strife which may cripple both corporations and obstruct the development of all the country through which the lines are to pass, they agree that each shall open up for the public certain parts of the country through which their lines are authorized to be built; that each shall pursue a plan, harmonious and consistent with its own system, affording to the public means of communication and travel, the one north and the other south of a certain line; that each may go on developing its enterprise and providing for the public, within certain prescribed territory, without the constant necessity of anticipating or avoiding the effects of the action of the other. How does this course infringe a sound dictate of public policy? It rather tends to promote than to defeat the opening of new districts to travel and commerce. It does not deprive the public of an advantage, but tends to secure it by leaving each company to the work of development in a certain district, without the necessity of confining itself to counteracting or countervailing the efforts of one to occupy a certain locality to the exclusion of the other." See also as to the validity of traffic agreements among competing railroad corporations, 2 Morawetz on Corporations (2d ed.), §§ 1130, 1131; Cleveland, Columbus, Cincinnati, etc. Ry. Co. v. Closser, 126 Ind. 348, 360; s. c., 26 N. E. Rep. 159 (1890).

In the following decisions, where, on the whole, the test applied has been that of extent, with the result of condemning the restrictions under consideration, there is observable an inclination to apply the test of reasonableness, though under the erroneous impression that the doctrine against restrictions upon competition is based on that against contracts in restraint of trade. Morris Run Coal Co. v. Barclay, 68 Pa. St. 173, 185 (1871); Craft v. McConoughy, 79 Ill. 346 (1875); Texas Standard Oil Co. v. Adoue, 83 Tex. 650; s. c., 19 S. W. Rep. 274 (1892); Milwaukee Masons & Builders' Assoc. v. Niezerowski, 95 Wis. 129; s. c., 70 N. W. Rep. 166 (1897); Pacific Factor Co. v. Adler, 90 Cal. 110, 117; s. c., 27 Pac. Rep. 36 (1891). In Hoffman v. Brooks, 23 Am. Law Reg. (N. S.) 648 (Super. Ct. Cinn., 1884), however, the court, while applying the test

competition, to exist, or, if it exists, to continue permanently. But restrictions upon competition exist in all stages, from the limited and legally unobjectionable restrictions already con-

as one *common to* contracts in restraint of trade, and restrictions upon competition, carefully distinguish between the two, thus avoiding the error above indicated. Here it is said: "In the first class of cases the interests of the public and those of the party are, to a great extent, the same. Both forbid any restriction of his earning power without an equivalent, and this is the reason why only a partial restriction is permitted, and that only for a valuable consideration. In the second class of cases, the immediate interests of the public and those of the contracting parties, are in conflict. The former desire lower, the latter higher, prices. Any prevention of competition injures the public in this regard. But when competition becomes so great that those engaged in a business cannot carry it on without loss, the public becomes exposed to the same danger as in the first class. The law, therefore, applies an analogous rule. Those engaged in any trade or business may, to such limited extent as may be fairly necessary to protect their interests, enter into agreements which will result in diminishing competition and so increasing prices. Just the extent to which this may be done, courts have been careful not to define, just as they have refused to set monuments along the line between fairness and fraud." But statutes aimed at restrictions upon competition, have been interpreted as including reasonable as well as unreasonable restrictions. Thus, notably, the prohibition of the Federal anti-trust act against "*every* contract, combination in form of trust or otherwise, or conspiracy in restraint of trade or commerce." United States v. Trans-Missouri Freight Assoc., 166 U. S. 290, 327; s. c., 17 Supm. Ct. Rep. 540 (1897); reversing 19 U. S. App. 36; s. c., 58 Fed. Rep. 58, above; and overruling on this point Dueber Watch-case Manuf. Co. v. Howard Watch & Clock Co., 35 U. S. App. 16, 27; s. c., 66 Fed. Rep. 637, 643 (2d Cir., 1895); Re Greene, 52 Fed. Rep. 104, 111 (Cir. Ct. Ohio, 1892). See Prescott & Arizona Central R. R. Co. v. Atchison, Topeka & Santa Fe R. R. Co., 78 Fed. Rep. 488 (Cir. Ct. N. Y., 1896); United States v. Addyston Pipe & Steel Co., 54 U. S. App. 723, 741; s. c., 85 Fed. Rep. 271, 278 (6th Cir., 1898). So of the prohibition of the Texas anti-trust act (L. 1889, ch. 117) against any contract whereby a "combination of capital, skill or acts" is formed, "to create or carry out restrictions in trade" or "to prevent competition in sale or purchase of commodities." Texas & Pacific Coal Co. v. Lawson, 89 Tex. 394; s. c., 34 S. W. Rep. 919 (1896); reversing 10 Civ. App. 491; s. c., 31 S. W. Rep. 843 (1895). See also Gates v. Hooper, 39 S. W. Rep. 186 (Tex. Civ. App., 1897); reversed in 90 Tex. 563; s. c., 39 S. W. Rep. 1079 (1897). But in Re Grice, 79

sidered, to absolute restrictions or approximations thereto. It almost necessarily follows that a restriction may be illegal, though incomplete, if approximating an absolute restriction.[1] So it is the generally accepted doctrine that a restriction will be pronounced illegal at any stage, though at the time harmless, if it appear that in the natural course of events it will develop into a restriction harmful, considered by itself; in other words, if its tendency is to become actually harmful.[2] The determination of the question of legality must de-

Fed. Rep. 627, 643 (Cir. Ct. Tex., 1897), the prohibition of the Texas act was held violative of the provision of the fourteenth amendment of the Federal constitution, against "depriving any person of life, liberty or property without due process of law," in that it included reasonable as well as unreasonable restrictions.

[1] See People v. North River Sugar Refining Co., 54 Hun (N. Y.), 354, 377; s. c., 7 N. Y. Suppl. 406 (1889); De Witt Wire-Cloth Co. v. N. J. Wire-Cloth Co., 16 Daly, 529; s. c., 14 N. Y. Suppl. 277; affirmed, it seems, in 38 N. Y. State Reporter, 1023 (1891); Chapin v. Brown, 83 Iowa, 156; s. c., 48 N. W. Rep. 1074 (1891); United States v. Addyston Pipe & Steel Co., 54 U. S. App. 723, 763; s. c., 85 Fed. Rep. 271, 293 (6th Cir., 1898); United States v. Coal Dealers' Assoc., 85 Fed. Rep. 252, 264 (Cir. Ct. Cal., 1898).

[2] Thus, in Anheuser-Busch Brewing Assoc. v. Houck, 27 S. W. Rep. 692 (Tex. Civ. App., 1894); affirmed as Houck v. Anheuser-Busch Brewing Assoc., in 88 Tex. 184; s. c., 30 S. W. Rep. 869 (1895), a combination to control the supply of beer was held illegal, notwithstanding testimony that its only object and effect were to reduce expenses. So, in People ex rel. v. Chicago Gas Trust Co., 130 Ill. 268, 291; s. c., 22 N. E. Rep. 798 (1889), where holding of stock by one corporation in others, was held illegal as enabling it to control them and establish a monopoly, the court say: "The question is not whether it has attempted to exercise such control; the law looks to the general tendency of the power conferred." This doctrine seems to be the true ground of the decision in More v. Bennett, 140 Ill. 69, 80; s. c., 29 N. E. Rep. 888 (1892), where an association of stenographers in Chicago was held illegal as having for its object the prevention of competition, notwithstanding that but a small portion of the law stenographers in the city belonged to the association. The court say: "True, the restraint is not so far-reaching as it would have been if all the stenographers in the city had joined the association; but, so far as it goes, it is precisely of the same character, produces the same results, and is subject to the same legal objection." So, in Stockton v. Central R. R. Co. of N. J., 50 N. J. Eq. 52, 81; s. c., 24 Atl. Rep. 964 (1892), where a lease between

pend largely on the circumstances of the particular case. In applying this rule, great weight will be given to the presumption, derived from common observation, of the tendency of an individual to promote his own interests, even at the expense of the public interest.[1] This doctrine applies even

railroad companies was held unlawful as part of a scheme to secure a monopoly of the Pennsylvania anthracite coal traffic, it is said: "It is true, co-operation of the remaining coal roads, which is necessary to a complete monopoly, has not yet been secured. By this lease only one competitor is silenced, and only a little more than one-half of the entire coal region is controlled. It is only the second step in the direction of monopoly, the first being the lease of the L. V. R. R. It is to be remembered, however, that the attorney-general may have his injunction when the *ultra vires* act tends, or is of a nature, to produce public injury. He is not required to wait until all the monopoly possible is created, or until all the injury possible is in process of infliction." See Trenton Potteries Co. v. Oliphant, — N. J. Eq. —; s. c., 39 Atl. Rep. 923, 944 (1898). So in Texas Standard Oil Co. v. Adoue, 83 Tex. 650; s. c., 19 S. W. Rep. 274 (1892), a combination of manufacturers of the products of cotton and cotton seed, embracing within its operation the chief cities or commercial centers of the State, as well as the cotton-producing regions thereof, was held illegal, though it did not appear that they were the only parties who were engaged at the specified localities in such manufacture. So in Central Ohio Salt Co. v. Guthrie, 35 Ohio St. 666 (1880), the restriction was held illegal, though "competition was not in fact destroyed." But a much less stringent view of the effect of an incomplete restriction, is indicated in Oakdale Manuf. Co. v. Garst, 18 R. I. 484; s. c., 28 Atl. Rep. 973 (1894), sustaining an agreement among three of the four companies in New England engaged in the manufacture of oleomargarine, to consolidate into one corporation. So in Kellogg v. Larkin, 3 Pinney (Wis.), 123, 145 (1851), sustaining an agreement to give the "full, absolute and uninterrupted control of the Milwaukee wheat market," so far as the contracting parties should be "able to do so, by virtue of their capacity as warehousemen or vessel and dock-owners," it appearing, however, that the rest of Wisconsin was an open and uninterrupted market for the sale of wheat. See, however, as to this decision, § 19, p. 99, above. So in Skrainka v. Scharringhausen, 8 Mo. App. 522 (1880; for facts see § 19, p. 100, above). In Jones v. Clifford's Executor (Fell), 5 Fla. 510, 515 (1854), a combination among the three pilots of the harbor of Pensacola for an equal sharing in the profits was sustained, as it seems, on evidence that the arrangement had worked well in practice.

[1] Thus, it is said in Stockton v. Central R. R. Co. of N. J., 50 N. J.

where no harmful restriction actually exists, there being merely an agreement that, if executed according to its terms, will produce such harmful restriction.[1] So, although at a given stage the restriction may be actually beneficial, the inquiry will not be limited to that stage, but the restriction will be pronounced illegal, if its remote and permanent, as distinguished

Eq. 52, 84; s. c., 24 Atl. Rep. 964 (1892): "It is possible that such a monopoly may be used as the defendants suggest, to introduce economies and cheapen coal, but it does violence to our knowledge of human nature to expect such a result." So in People v. North River Sugar Refining Co., 54 Hun (N. Y.), 354, 379; s. c., 7 N. Y. Suppl. 406 (1889): "Where the effect of the arrangement is to permanently secure the control, or the substantial control, of this product and of its sale, as that has been done, it is no more than just to infer that the control is to be used to avoid competition and enhance prices, and in that manner, as it is the ordinary expedient for that end, promote the interests and add to the profits of the associates." See also State ex rel. v. Standard Oil Co., note 1, p. 140, below. But a different view was taken in Central Shade Roller Co. v. Cushman, 143 Mass. 353; s. c., 9 N. E. Rep. 629 (1887), sustaining a combination among the principal dealers in a commodity, who substantially supplied the market. The court say: "We cannot assume that the purpose and effect of the combination are to unduly raise the price of the commodity. A natural purpose and a natural effect are to maintain a fair and uniform price and to prevent the injurious effects, both to producers and customers, of fluctuating prices, caused by undue competition. When it appears that the combination is used to the public detriment, a different question will be presented from that now before us. The contract is apparently beneficial to the parties to the combination, and not necessarily injurious to the public, and we know of no authority or reason for holding it to be invalid, as in restraint of trade or against public policy."

[1] People v. Sheldon, 139 N. Y. 251, 264; s. c., 34 N. E. Rep. 785 (1893), holding an agreement to fix the price of coal illegal, as a conspiracy "to commit an act injurious to trade or commerce" under the New York statute. The court say: "The price of coal now fixed by the exchange may be reasonable, in view of the interests both of dealers and consumers, but the organization may not always be guided by the principle of absolute justice. There are some limitations in the constitution of the exchange, but these may be changed and the price of coal may be unreasonably advanced." See Texas & Pacific Ry. Co. v. Southern Pacific Ry. Co., 41 La. Ann. 970; s. c., 6 So. Rep. 888 (1889). So where the scheme failed. Trenton Potteries Co. v. Oliphant, — N. J. Eq. —; s. c., 39 Atl. Rep. 923, 944 (1898).

from its immediate and temporary, effects, promise to be harmful.[1] Thus, while the raising of prices may not be an immediate and temporary effect, it may be a remote and permanent effect.[2] Nor will so uncertain an element as the intent of the parties to the restriction be considered, the test being rather whether, under the circumstances, the opportunity exists for them to create, as a remote and permanent effect, a harmful restriction.[3]

[1] Thus notably in State ex rel. v. Standard Oil Co., 49 Ohio St. 137, 186; s. c., 30 N. E. Rep. 279 (1892), the "Standard Oil Trust" was condemned, even conceding that it had improved the quality, and cheapened the cost of petroleum and its products to the consumer This decision was approvingly cited on this point in Trenton Potteries Co. v. Oliphant, — N. J. Eq. —; s. c., 39 Atl. Rep. 923, 944 (1898). In United States v. Coal Dealers' Assoc., 85 Fed. Rep. 252, 264 (Cir. Ct. Cal., 1898), a combination to fix the price of coal was held illegal, against the contention that it was beneficial in protecting consumers from the dishonest methods of some dealers, and protecting wholesale dealers in enabling them to collect their bills from retail dealers. See also note 2, below.

[2] Thus, restrictions were condemned, notwithstanding that they had resulted in lowering prices, in Richardson v. Buhl, 77 Mich. 632, 660; s. c., 43 N. W. Rep. 1102 (1889); Strait v. National Harrow Co., 18 N. Y. Suppl. 224 (Supm. Ct., Sp. T., 1891). Richardson v. Buhl was approvingly cited on this point in Trenton Potteries Co. v. Oliphant, — N. J. Eq. —; s. c., 39 Atl. Rep. 923, 944 (1898). Compare United States v. Coal Dealers' Assoc., 85 Fed. Rep. 252, 264 (Cir. Ct. Cal., 1898). So, in the absence of proof that unreasonable prices resulted. Central Ohio Salt Co. v. Guthrie, 35 Ohio St. 666 (1880); Anderson v. Jett, 89 Ky. 375; s. c., 12 S. W. Rep. 670 (1889); Hoffman v. Brooks, 23 Am. Law Reg. (N. S.) 648 (Super. Ct. Cinn., 1884); People v. Sheldon, 139 N. Y. 251; s. c., 34 N. E. Rep. 785 (1893). So, in People v. Milk Exchange, 145 N. Y. 267, 274; s. c., 39 N. E. Rep. 1062 (1895), where a combination to control the price and supply of milk was held illegal, it is said: "It may be claimed that the purpose of the combination was to reduce the price of milk, and that, it being an article of food, such reduction was not against public policy. But the price was fixed for the benefit of the dealers, and not the consumers, and the logical effect upon the trade of so fixing the price by the combination, was to paralyze the production and limit the supply, and thus leave the dealers in a position to control the market, and at their option to enhance the price to be paid by the consumers."

[3] Thus, in Morris Run Coal Co. v. Barclay Coal Co., 68 Pa. St. 173, 184 (1871), the agreement was held

§ 24. Legality of restriction upon competition, as determined by character of commodity.— It is obvious that there is an infinite variety in the subjects capable of being monopolized. Some are the products of regions small in extent and, it may be, difficult of access. Others are manufactured articles capable of being produced to an unlimited extent, according to the demand. As to such, the task of obtaining a monopoly in the manufacture and sale may be extremely difficult, and perhaps in some cases practically impossible.[1] Yet no different rule applies here, the difference being one of degree rather than of kind.[2] But the view has been frequently expressed that the doctrine against restrictions upon competition is confined to *articles of necessity*,

void, notwithstanding the claim that "its true object was to lessen expenses, to advance the quality of the coal, and to deliver it in the markets it was to supply, in the best order, to the consumer." So, in Hooker v. Vandewater, 4 Denio (N. Y.), 349 (1847), of an agreement professedly "for the purpose of establishing and maintaining fair and uniform rates of freight and equalizing the business among themselves, and to avoid all unnecessary expense." So, in United State v. Trans-Missouri Freight Assoc., 166 U. S. 290; s. c., 17 Supm. Ct. Rep. 540 (1897), of an agreement professedly "for the purpose of mutual protection by establishing and maintaining reasonable rates, rules and regulations on all freight traffic, both through and local." See also Nester v. Continental Brewing Co., 161 Pa. St. 473; s. c., 29 Atl. Rep. 102 (1894); Judd v. Harrington, 139 N. Y. 105; s. c., 34 N. E. Rep. 790 (1893). *A fortiori*, in case of a mere absence of expression of intention to create a restriction upon competition. People v. North River Sugar Refining Co., 54 Hun (N. Y.), 354, 374, 376; s. c., 7 N. Y. Suppl. 406 (1889).

[1] See remarks of Lacombe, J., in Dueber Watch-case Manuf. Co. v. Howard Watch & Clock Co., 35 U. S. App. 16, 28; s. c., 66 Fed. Rep. 637, 644 (2d Cir., 1895), as to a combination among makers of watch-cases, distinguishing Arnot v. Pittston & Elmira Coal Co., 68 N. Y. 558 (1877), as a case where the region of the production of the commodity in question (anthracite coal) was known to be limited.

[2] Thus, in People v. North River Sugar Refining Co., 54 Hun (N. Y.), 354, 377; s. c., 7 N. Y. Suppl. 406 (1889), it is said that the definition of monopoly is "applicable to every monopoly, whether the supply be restricted by nature or susceptible of indefinite production. The difficulty of effecting the unlawful purpose may be greater in one case than in the other, but it is never impossible."

as distinguished from what may be termed articles of luxury.[1] If such a distinction exists, its application would seem to be somewhat difficult and to depend on varying conditions, such, for instance, as those of climate. But the distinction seems never to have been very firmly established in our jurisprudence, and the present tendency seems to be in favor of repudiating it as inapplicable to any lawful business.[2]

[1] The limitation seems to have crept in without much observation, and to be based on the view expressed in Pettamberdas v. Thackoorseydass, 7 Moore P. C. C. 239, 262 (1850), that "ingrossing can be committed only with respect to the necessaries of life." Applying this limitation, a restriction upon competition in the production of curtain fixtures known as "wood balance shade rollers," was sustained in Central Shade Roller Co. v. Cushman, 143 Mass. 353; s. c., 9 N. E. Rep. 629 (1887). So of fish glue, in Gloucester Isinglass & Glue Co. v. Russia Cement Co., 154 Mass. 92, 94; s. c., 27 N. E. Rep. 1005 (1891). So of washing-machines. Dolph v. Troy Laundry Machinery Co., 28 Fed. Rep. 553 (Cir. Ct. N. Y., 1886). See remarks of Lacombe, J., in Dueber Watch-case Manuf. Co. v. Howard Watch & Clock Co., note 1, p. 141, above; also Queen Ins. Co. v. State, 86 Tex. 250, 271; s. c., 24 S. W. Rep. 397 (1893), holding the limitation inapplicable to a combination among insurance companies to fix rates of insurance and agents' commissions. In Meredith v. N. J. Zinc & Iron Co., 55 N. J. Eq. 211, 221; s. c., 37 Atl. Rep. 539 (1897), it was held applicable to zinc ore, characterized as "property which in its natural state is of no use to mankind, and which, after it has been manufactured and made fit for use, can hardly be classed as a necessity."

The following are cases where restrictions have been held invalid as relating to articles of necessity: Morris Run Coal Co. v. Barclay Coal Co., 68 Pa. St. 173, 184 (1871; coal); Richardson v. Buhl, 77 Mich. 632, 657; s. c., 43 N. W. Rep. 1102, (1889; friction matches); State v. Nebraska Distilling Co., 29 Neb. 700, 718; s. c., 46 N. W. Rep. 155 (1890; alcohol); Drake v. Siebold, 81 Hun, 178; s. c., 30 N. Y. Suppl. 697 (1894; coal); National Harrow Co. v. Bement, 21 N. Y. App. Div. 290, 296; s. c., 47 N. Y. Suppl. 462 (1897; harrows); Samuels v. Oliver, 130 Ill. 73; s. c., 22 N. E. Rep. 499 (1889; wheat); Raymond v. Leavitt, 46 Mich. 447 (1881; wheat); Cummings v. Foss, 40 Ill. App. 523 (1891); confirmed in subsequent decision in Foss v. Cummings, 149 Ill. 353; s. c., 36 N. E. Rep. 553 (1894; corn); Trenton Potteries Co. v. Oliphant, — N. J. Eq. —; s. c., 39 Atl. Rep. 923, 945 (1898; sanitary pottery ware). See Herriman v. Menzies, 115 Cal. 16, 21; s. c., 46 Pac. Rep. 730 (1896).

[2] It was repudiated in Hoffman v. Brooks, 23 Am. Law Reg. (N. S.)

§ 25. Legality of restriction upon competition, as determined by character of business as public or private.— Recently the view has obtained considerable recognition that there exists a test of the legality of restrictions upon competition, based on the difference between a business of a "public character" and other kinds of business.[1] Just

648 (Super. Ct. Cinn., 1884), where an agreement for fixing rates for services by tobacco warehousemen, was held void, and the court say: "Although courts may be inclined to apply this rule more strictly in cases involving the necessaries of life or services of a *quasi*-public nature, there is no authority for excepting from its operations any legitimate trade or business." It was also repudiated in De Witt Wire-Cloth Co. v. N. J. Wire-Cloth Co., 16 Daly, 529; s. c., 14 N. Y. Suppl. 277; affirmed, it seems, in 38 N. Y. State Reporter, 1023 (1891; wire cloth); People v. Duke, 19 Misc. 293 (N. Y. Co. Gen. Sessions, 1897; cigarettes); Nester v. Continental Brewing Co., 161 Pa. St. 473; s. c., 29 Atl. Rep. 102 (1894; beer); Chippewa Lumber Co. v. Tremper, 75 Mich. 86; s. c., 42 N. W. Rep. 532 (1889; intoxicating liquors); United States v. Addyston Pipe & Steel Co., 54 U. S. App. 723, 754; s. c., 85 Fed. Rep. 271, 286 (6th Cir., 1898; where, however, it was regarded as unnecessary to decide the question, the articles under consideration, viz., water, gas and sewer pipes, being regarded as articles of necessity). But in Anheuser-Busch Brewing Assoc. v. Houck, 27 S. W. Rep. 692 (Tex. Civ. App., 1894); affirmed as Houck v. Anheuser-Busch Brewing Assoc., in 88 Tex. 184; s. c., 30 S. W. Rep. 869 (1895), where a restriction as to beer was held unlawful under the statute, it is said that it would not have been invalid at common law, the policy of the laws of the State not being toward the unrestricted or general sale of beer. Compare Nester v. Continental Brewing Co., above. In Cummings v. Union Blue Stone Co., 15 N. Y. App. Div. 602; s. c., 44 N. Y. Suppl. 787 (1897), a combination to control the bluestone trade was held void, though there is no such general need or demand for bluestone, as to bring it within the category of articles of necessity, in the ordinary sense. The court say: "Nevertheless, a production the sales of which in this State in a single year amount to $1,500,000, is sufficiently useful and important to the community to bring it within the operation of that rule of law which invalidates agreements to prevent competition in trade." In Texas & Pacific Coal Co. v. Lawson, 89 Tex. 394, 400; s. c., 34 S. W. Rep. 919 (1896), reversing 10 Civ. App. 491; s. c., 31 S. W. Rep. 843 (1895), the broad language of the Texas anti-trust act was declared to ignore the distinction.

[1] People ex rel. v. Chicago Gas Trust Co., 130 Ill. 268, 293; s. c., 22 N. E. Rep. 798 (1889). Here the decision might well have rested on

what a business of a "public character" is, has perhaps not been very clearly defined, but it seems to involve the conception of a business the right to exercise which de-

the ground that the acts complained of were *ultra vires* (see note 2, p. 146, below); or on the ground that the restriction was an *unreasonable* one. In any view it was unnecessary to apply the test thus indicated: "Whatever tends to prevent competition between those engaged in a public employment, or business impressed with a public character, is opposed to public policy and therefore unlawful." In many cases where the doctrine is recognized as applying to "contracts in restraint of trade," we are to understand the statement as intended to apply to restrictions upon competition, in view of the frequent confounding of these two classes of cases; or if this be not the case, the courts applying it to contracts in restraint of trade would doubtless apply it to restrictions upon competition pure and simple. In Gibbs v. Consolidated Gas Co. of Baltimore, 130 U. S. 396, 408; s. c., 9 Supm. Ct. Rep. 553 (1889), the rule is thus stated: "In the instance of business of such character that it presumably cannot be restrained to any extent whatever, without prejudice to the public interest, courts decline to enforce or sustain contracts imposing such restraint, however partial, because in contravention of public policy." To similar effect, West Virginia Transp. Co. v. Ohio River Pipe Line Co., 22 W. Va. 600, 625 (1883). And the same doctrine was recognized or applied in Queen Ins. Co. v. State, 86 Tex. 250, 269, 274; s. c., 24 S. W. Rep. 397 (1893); Texas & Pacific Ry. Co. v. Southern Pacific Ry. Co., 41 La. Ann. 970; s. c., 6 So. Rep. 888 (1889); Cowan v. Fairbrother, 118 N. C. 406; s. c., 24 S. E. Rep. 212 (1896); South Chicago City Ry. Co. v. Calumet Electric Street Ry. Co., 171 Ill. 391, 397; s. c., 49 N. E. Rep. 576 (1898). It seems to be recognized in United States v. Trans-Missouri Freight Assoc., 166 U. S. 290, 335; s. c., 17 Supm. Ct. Rep. 540, 556 (1897), though there the restriction under consideration was held illegal by virtue of statute. Here, where the question was as to the legality of an agreement among railroad companies for the establishment of rates, the court say: "The general reasons for holding agreements of this nature to be invalid, even at common law, on the part of railroad companies, are quite strong, if not conclusive." Compare Dueber Watch-case Manuf. Co. v. Howard Watch & Clock Co., 35 U. S. App. 16, 28; s. c., 66 Fed. Rep. 637, 644 (2d Cir., 1895). In Cleveland, Columbus, Cincinnati, etc. Ry. Co. v. Closser, 126 Ind. 348, 360; s. c., 26 N. E. Rep. 159 (1890), the court, while inclined to take the same view, content themselves with the *presumption* that the restriction in that case (upon competition by common carriers) was illegal. See dissenting opinion of Shiras, J., below, in United States v. Trans-Missouri Freight Assoc., 19 U. S. App. 36, 75;

pends on a legislative grant.[1] In this view a restriction upon competition by one engaged in such business is necessarily illegal, not upon the general grounds of the illegality of such restrictions, but upon the distinct ground that the business is one of a public character. But in our view this distinction has no existence. A business of a public character, as we have defined it, is universally (though not in the nature of things necessarily) carried on under the authority of a corporate character, that is, by a corporation. The validity of an act of a corporation is, generally speaking, determined by whether it is within the authority conferred by the charter. If, for instance, such act is one imposing a restriction upon competition, and is legal according to the tests applicable to such restrictions generally, the further test, in our view, is whether it is within the authority conferred by the charter, without reference to the character of the business as public.[2] The existing principles

s. c., 58 Fed. Rep. 58, 84 (8th Cir., 1893). See also National Benefit Co. v. Union Hospital Co., 45 Minn. 272; s. c., 47 N. W. Rep. 806 (1891); Meredith v. N. J. Zinc & Iron Co., 55 N. J. Eq. 211, 221; s. c., 37 Atl. Rep. 589 (1897).

[1] Thus, supplying illuminating gas by means of pipes laid in the streets of a city. People ex rel. v. Chicago Gas Trust Co., note 2, p. 143, above (p. 293); Gibbs v. Consolidated Gas Co. of Baltimore, note 2, p. 144, above (p. 411). In the case last cited it is said: "These gas companies entered the streets of Baltimore, under their charters, in the exercise of the equivalent of the power of eminent domain, and are to be held as having assumed an obligation to fulfill the public purposes to subserve which they were incorporated." So, transportation of oil in tubes. West Virginia Transp. Co. v. Ohio River Pipe Line Co., 22 W. Va. 600 (1883). So, transportation by railroad. Texas & Pacific Ry. Co. v. Southern Pacific Ry. Co., 41 La. Ann. 970; s. c., 6 So. Rep. 888 (1889); United States v. Trans-Missouri Freight Assoc., note 2, below.

[2] As was said in the dissenting opinion of White, J., in United States v. Trans-Missouri Freight Assoc., 166 U. S. 290, 373; s. c., 17 Supm. Ct. Rep. 540 (1897): "The fallacy consists in overlooking the distinction between acts of a public corporation which are *ultra vires* and those which are not. If the contract of such a corporation which is assailed be *ultra vires*, of course the question of reasonableness becomes irrelevant, since the charter is the reason of the being of the corporation." And it is here pointed out that in Gibbs v. Consolidated Gas Co. of Baltimore, above,

of law being sufficient to determine the question of legality in such case, it only serves to produce confusion, to introduce a further and unnecessary test.

and cases therein cited, *ultra vires* contracts were under consideration. Chicago, St. Louis, etc. R. R. Co. v. Pullman Southern Car Co., 139 U. S. 79; s. c., 11 Supm. Ct. Rep. 490 (1891), is cited as a case where such a restraint was upheld. So in the decision below in United States v. Trans-Missouri Freight Assoc., 19 U. S. App. 36, 62; s. c., 58 Fed. Rep. 58, 74 (8th Cir., 1893), it is contended that restrictions upon competition among railroad corporations are subject to the test of reasonableness. See this decision as to the effect of the Interstate Commerce Act. This view (of White, J.) is sustained by the facts in the cases wherein the doctrine has been laid down. Thus, in Gibbs v. Consolidated Gas Co. of Baltimore, the restriction in question, created by a contract between two gas companies, was expressly prohibited by statute. Or the decision might have rested on the ground that the contract provided for the abandonment by one of the companies of the discharge of its duties to the public, to say nothing of the general rules applicable to restrictions upon competition. On the same general ground may doubtless be explained West Virginia Transp. Co. v. Ohio River Pipe Line Co., 22 W. Va. 600 (1883), where it was held illegal for the corporation to make a grant of an *exclusive* right of way and privilege, to construct and maintain lines of tubing, for the transportation of oil through certain lands. So People ex rel. v. Chicago Gas Trust Co., 130 Ill. 268; s. c., 22 N. E. Rep. 798 (1889), can be explained on the ground of the absence of power in the defendant corporation to hold the stock of other gas companies, in the absence of express statutory authority. In 36 Am. Law Reg. & Rev. 307, 319 (1897), the authorities are discussed by G. S. Patterson, and the conclusion reached that "there is no business, whatever be the public interest therein, that any restraint thereon is *ipso facto* void; but if the effect of the restraint be to form a monopoly of such business, or to prevent a public corporation from the performance of its chartered functions, then the agreement is void." In San Diego Water Co. v. San Diego Flume Co., 108 Cal. 549; s. c., 41 Pac. Rep. 495 (1895), where the restriction was held valid as reasonable, it would seem that it would have been held invalid, had the doctrine under consideration been applied, it being created by an agreement between a "water company" and a "flume company." So it may be of cases sustaining agreements by railroad companies for the location of a route; as, for instance, Baltimore & Ohio R. R. Co. v. Ralston, 41 Ohio St. 573, 588 (1885); or of a station; as, for instance, Louisville, New Albany, etc. Ry. Co. v. Sumner, 106 Ind. 55, 59; s. c., 5 N. E. Rep. 404 (1886); Texas & St. Louis R. R. Co. v. Robards, 60 Tex. 545 (1883). And for instances of restrictions upon competition by carriers, sustained under the test of reasonableness, see § 22.

in restriction of competition;
A restriction upon competition is
essarily, the result of an agreement
persons. We say, not necessarily, be-
at there is in the nature of things no
tion upon competition, amounting even
opoly, should not result from the efforts
ual.[1] The precise legal *status* of an indi-

tario Salt Co. 277; s. c., 88 S. W. Rep. 27 (1896); Co., 18 Grant Texas Brewing Co. v. Meyer, — ., where, assum- Tex. Civ. App. —; s. c., 88 S. W. the doctrine con- Rep. 263 (1896); Gates v. Hooper, 90 hancing of prices, Tex. 563; s. c., 39 S. W. Rep. 1079 it did not apply to (1897); reversing Id. 186 (Tex. Civ. among manufactur- App., 1897); Texas Brewing Co. v. t say (p. 544): "The Anderson, — Tex. Civ. App. —; ot to be purchased in s. c., 40 S. W. Rep. 737 (1897). The but was actually to be word *combination*, as used in this the parties themselves, act, is held to mean "union" or oduct they could not be "association." Texas & Pacific to part with, except on Coal Co. v. Lawson; Gates v. terms." The so-called Hooper, both above. In Gates v. t acts are not, however, Hooper, where it was held not to ly directed against acts re- cover the case of an agreement by from the efforts of a single the seller of a business to retire dual; for instance, the prohi- from that line of business, the of the Texas act of 1889 court say: "If there be no union st a "*combination* of capital, or association by two or more of l or acts," to prevent compe- their 'capital, skill or acts,' there on, etc., as to which see An- can be no 'combination,' and hence euser-Busch Brewing Assoc. v. no 'trust.' When we consider the Houck, 27 S. W. Rep. 692 (Tex. purposes for which the 'combina- Civ. App., 1894); affirmed as Houck tion' must be formed to come v. Anheuser-Busch Brewing Assoc., within the statute, the essential in 88 Tex. 184; s. c., 30 S. W. meaning of the word 'combina- Rep. 869 (1895); Texas & Pacific tion,' and the fact that a punish- Coal Co. v. Lawson, 89 Tex. 394; ment is prescribed for each day that s. c., 34 S. W. Rep. 919 (1896); re- the trust continues in existence, versing 10 Civ. App. 491; s. c., 31 we are led to the conclusion that S. W. Rep. 843 (1895); Fuqua v. the union or association of 'capital, Pabst Brewing Co., 90 Tex. 298; skill or acts,' denounced is where s. c., 38 S. W. Rep. 29 (1897); Texas the parties in the particular case Brewing Co. v. Templeman, 90 Tex. designed the united co-operation of

vidual in this situation has not been clearly defined, save so far as it may be inferred from the doctrines declared with reference to corporations, the legal *status* of which we shall consider hereafter. But if the restriction results from the joint efforts of two or more individuals, it seems a necessary conclusion that it also results from some agreement between them, express or implied. At any rate, we shall for the present confine our attention to restrictions upon competition resulting from agreement. Leaving out of consideration mere agreements to fix price, to be hereafter considered,[1] agreements resulting in a restriction upon competition seem to be governed by the rules applicable to agreements generally, as to form and construction.[2] So far as the nature

such agencies, which might have been otherwise independent and competing, for the accomplishment of one or more of such purposes." So the word *combination*, as thus used, was held not to cover the case of a mere agreement between principal and agent, in Welch v. Phelps & Bigelow Windmill Co., 89 Tex. 653; s. c., 36 S. W. Rep. 71 (1896); Gates v. Hooper, above, where the agreement of the seller to exert himself to aid the buyer in securing patronage, was held to merely constitute the former the agent of the latter for that purpose. See also in American Fire Ins. Co. v. State, — Miss. —; s. c., 22 So. Rep. 99 (1897), the prohibition of the Mississippi act (Code, § 4437, subd. 9) against any combination, etc., designed to place the control of any *business* in the hands of trustees, applied to a combination among fire insurance corporations.

[1] See § 27.

[2] Thus, the agreement held illegal as restricting competition was in form a *lease*, in Field Cordage Co. v. National Cordage Co., 6 Ohio Cir. Ct. 615 (1892); Clancey v. Onondaga Salt Manuf. Co., 62 Barb. (N. Y.) 395 (1862); a *covenant* in a deed against the sale of liquor, in Chippewa Lumber Co. v. Tremper, 75 Mich. 36; s. c., 42 N. W. Rep. 532 (1889). So the agreement consisted of a by-law (or by-laws) or a rule (or rules) of an association, in Sayre v. Louisville Union Benev. Assoc., 1 Duvall (Ky.), 143 (1863); More v. Bennett, 140 Ill. 69; s. c., 29 N. E. Rep. 888 (1892); Urmston v. Whitelegg, 63 L. T. R. N. S. 455 (1891); Milwaukee Masons' & Builders' Assoc. v. Niezerowski, 95 Wis. 129; s. c., 70 N. W. Rep. 166 (1897). See People ex rel. v. N. Y. Board of Underwriters, 54 How. Pr. (N. Y.) 240 (Supm. Ct., Sp. T., 1875). So of articles of voluntary association. Central Ohio Salt Co. v. Guthrie, 35 Ohio St. 666 (1880). So of regulations of "exchange" composed of dealers. People v. Sheldon, 139 N. Y. 251; s. c., 34 N. E. Rep. 785 (1893);

of things is concerned, there might be an infinite variety in such agreements, as to form. Nevertheless, the conditions of business have in practice reduced such agreements to a few generally recognized forms, prominently what are known as "pools" and "trusts." A "pool" may be defined as an agreement for the division of profits, illegal as restricting competition.[1] It will be noted that, apart from

Drake v. Siebold, 81 Hun (N. Y.), 178; s. c., 30 N. Y. Suppl. 697 (1894). So of the constitution and by-laws of an association of dealers. United States v. Coal Dealers' Assoc., 85 Fed. Rep. 252 (Cir. Ct. Cal., 1898). For an application of the rule allowing a resort to the surrounding circumstances, for the purpose of construing an agreement in writing, see People v. North River Sugar Refining Co., 54 Hun (N. Y.), 354, 377; s. c., 7 N. Y. Suppl. 406 (1889). In United States v. Hopkins, 82 Fed. Rep. 529 (Cir. Ct. Kan., 1897), the monopoly condemned resulted mainly from the enforcement of a "rule of an exchange" composed of persons engaged in the live-stock commission business. Such rule prohibited any member from dealing with any person violating any of the rules or regulations of the exchange, or an expelled or suspended member, after notice of such suspension had been issued by the secretary or board of directors. The court, in determining the question of the existence of an illegal monopoly, considered not only "what appeared upon the face of its (the exchange's) preamble, rules and by-laws," but "the entire situation and the practical working and results of the defendants' methods of doing business." It appeared that the enforcement of such rule operated as a "boycott," to drive out of business all independent dealers. In Field Cordage Co. v. National Cordage Co., 6 Ohio Cir. Ct. 615 (1892), similar agreements with others engaged in the same business, were considered. See also as to reading different instruments together, Judd v. Harrington, 139 N. Y. 105; s. c., 34 N. E. Rep. 790 (1893). As to the question of legality being one of law rather than of fact, see § 17. That a contract in restriction of competition is to be strictly construed as against a party complaining of violation, see Wiggins Ferry Co. v. Ohio & Mississippi Ry. Co., 73 Ill. 360 (1874). In Standard Oil Co. v. Scofield, 16 Abb. N. C. (N. Y.) 372 (Supm. Ct., Sp. T., 1885), the rule that all reasonable intendments are to be indulged in, in support of a pleading demurred to, was applied, sustaining the complaint in an action based on a contract claimed to be illegal as "in restraint of trade," *i. e.*, as creating an unlawful restriction upon competition.

[1] In American Biscuit & Manuf. Co. v. Klotz, 44 Fed. Rep. 721 (Cir. Ct. La., 1891), "pooling" is defined as "an aggregation of property or capital belonging to different per-

the element of illegality, there seems to be no difference in kind between a pool and an ordinary partnership. The distinction between a pool and a trust is artificial rather than substantial.[1] In case of a trust, in addition to the agreement for division of profits, the parties to the agreement (commonly, but not necessarily, corporations or stockholders therein) surrender the direct control of the management of the business covered by the agreement, to a central board of "trustees,"[2] the interest of such parties being commonly

sons, with a view to common liabilities and profits," and it is said that the expression in the Federal anti-trust act, "combination in the form of trust," "would seem to point to just what in popular language is meant by pooling." By § 5 of the Interstate Commerce Act of 1887, it is forbidden to "any common carrier subject to the provisions of this act, to enter into any contract, agreement or combination with any other common carrier or carriers, for the pooling of freights of different and competing railroads, or to divide between them the aggregate or net proceeds of the earnings of such railroads, or any portion thereof." See as to pooling contracts at common law and under this provision, United States v. Trans-Missouri Freight Assoc., 58 Fed. Rep. 58; s. c., 19 U. S. App. 36 (8th Cir., 1893). A pooling agreement among such carriers, entered into prior to such act, was condemned in Chicago, Milwaukee & St. Paul Ry. Co. v. Wabash, St. Louis & Pacific Ry. Co., 27 U. S. App. 1; s. c., 61 Fed. Rep. 993 (8th Cir., 1894). The court say: "The contract removed every incentive to the companies to afford the public proper facilities, and to carry at reasonable rates, for, under its provisions, a company is entitled to its full percentage of gross earnings, even though it does not carry a pound of freight. The necessary and inevitable result of such a contract is to foster and create poorer service and higher rates." See note on "Syndicates and Pools" in 16 Abb. N. C. 380.

[1] It is said in Spelling on Trusts and Monopolies, § 109, that "the latter-day 'trust' is but an adaptation of the railroad pool to manufacturing and trading corporations."

[2] See Cook on Stock, Stockholders, etc., § 503*a*, quoted and applied in State ex rel. v. Standard Oil Co., 49 Ohio St. 137, 185; s. c., 30 N. E. Rep. 279 (1892); also article by Prof. T. W. Dwight in 3 Pol. Sci. Quart. 592, 611 (1888), with a discussion of the "Sugar Trust" deed; article by U. M. Rose on "Strikes and Trusts" in 27 Am. Law Rev. 708 (1893); article by S. C. T. Dodd in 7 Harv. Law Rev. 157 (1893). In 1 Harv. Law Rev. 133 (1887), F. J. Stimson defines a trust as "a combination of property, real or personal, with powers of management or absolute disposal, or of stock in corporations, in the hands of a few persons," and

represented by "trust certificates" received in lieu of stock in the corporations.[1] The legal effects produced in such case by the character of the parties as stockholders, we shall

says that "the origin of the word 'trust' seems to have been the well-known Standard Oil monopoly." In People ex rel. v. American Tobacco Co., 2 Chicago L. J. Weekly 249 (Cook Co. Cir. Ct., 1897?), a "commercial trust" is defined as "a combination of persons, copartnerships or corporations engaged in similar industries, for the purpose of uniting their respective interests under one governing body, invested with the power to limit the production, dictate the sales, and regulate the prices of the articles produced by its agents and members, thereby tending to destroy competition." The so-called "trust" agreements are all essentially similar in form. The following, under consideration and thus described in Bishop v. American Preservers' Co., 157 Ill. 284, 311; s. c., 41 N. E. Rep. 765 (1895), is here presented by way of illustration: "The agreement recites that it is designed by its signers to form a trust for the purpose of securing co-operation in the business of manufacturing preserves, etc., and of selling and dealing in the same in home and foreign markets." There were nine trustees, six designated by name and authorized to elect three others. "Such trustees are empowered to organize corporations with all or any of the powers specified in the purposes of the agreement; and the stock of such corporations is to be issued to or purchased by said trustees. For this stock the trustees are to issue certificates of trust. The agreement is to go into effect within sixty days from the time those holding the majority of the stock in seven specified corporations, formed or to be formed, shall transfer the same to the trustees. Each signer of the agreement agrees to assign and transfer to said trustees absolutely, all the shares which he may own in said corporations formed or to be formed, and is to

[1] In State v. American Cotton Oil Trust, 40 La. Ann. 8; s. c., 3 So. Rep. 409 (1888), an injunction was refused against dealing in the shares of the American Cotton Oil Trust, the court saying: "If these certificates have been taken as the price or in exchange for $10,000,000 of property transferred to the trust, then, whatever be their validity and effect as shares of stock, whether or not they confer on the holders the privileges of corporate stockholders, and whether or not they confer any right to participate in the carrying on of any illegal business, yet they undoubtedly do represent an interest in the property referred to, and as such have a legal and real value; and we cannot understand how such property rights can be placed *hors de commerce* by an injunction." See also, as to the rights of a transferee of a Standard Oil Trust certificate, Rice v. Rockefeller, 134 N. Y. 174; s. c., 31 N. E. Rep. 907 (1892).

hereafter consider.[1] The legal difficulties experienced in the organization and conduct of such trusts, have led to their disuse, and combined action to restrict competition is now commonly through the medium of corporate organization. The original term "trust" is, however, commonly applied to the new forms of combination.

receive therefor, not money, but trust certificates, equal to the appraised amount of the earning capacity of his stock, as fixed by the trustees and the stockholder. The trustees are authorized to purchase in the same way, by the issue of trust certificates, other stocks of the same companies, and also the property and business of any firm or individual engaged in the business of manufacturing and dealing in said products. The trustees are to exercise supervision over the corporations whose stocks are transferred to them, and are empowered to elect themselves directors and officers in such corporations, and procure such management of the same as will be conducive to the interests of the holders of the trust certificates. These trust certificates are divided into shares of the par value of $100 each and are prepared by the trustees. They provide that the holders thereof shall be bound by the terms of the trust agreement, and of the by-laws passed in pursuance thereof, and are intended to show the interest of each beneficiary in the trust. The trustees hold the stocks transferred to them, in trust for the holders of the certificates, and are to receive and hold the dividends or interest upon said stocks, and are to distribute the same by declaring dividends upon the certificates. The stocks so transferred to the trustees are to be held by them for the benefit of all the owners of the trust certificates. The trust is to continue for twenty-five years, subject to the right of seventy-five per cent. of the holders of the certificates to terminate it after the expiration of one year, and of sixty-five and two-thirds per cent. of such holders to terminate it at the end of five years; and the trustees cannot sell or surrender any of the stocks held by them, during the continuance of the trust, without the consent of a majority in number and value of the holders of the trust certificates." See also descriptions of the agreements under consideration in State ex rel. v. Standard Oil Co., 49 Ohio St. 137; s. c., 30 N. E. Rep. 279 (1892); People v. North River Sugar Refining Co., 121 N. Y. 582; s. c., 24 N. E. Rep. 834 (1890); Distilling & Cattle Feeding Co. v. People, 156 Ill. 448; s. c., 41 N. E. Rep. 188 (1895); Gould v. Head, 38 Fed. Rep. 886 (Cir. Ct. Colo., 1889); Same v. Same, 41 Id. 240 (Cir. Ct. Colo., 1890); and see Spelling on Trusts and Monopolies, ch. 12. What are known as "car trusts" resemble in name only the trusts now under consideration. See, generally, Ray on Contractual Limitations, p. 248.

[1] See § 31.

§ 27. Agreements to fix price or wages; "corners."— Leaving for the present out of consideration agreements generally that tend to restrict competition, we confine our attention to agreements to fix price. The fixing of the price of a commodity by a single individual engaged in business, is one of the ordinary incidents of commercial intercourse. But, though the price is fixed by his immediate agency, it is, speaking generally, in reality fixed by conditions beyond his control, that is, by the forces of competition, so that it would be idle for him to seek to establish a price materially exceeding the price so fixed. There is an obvious distinction between such a case, and that of a single individual fixing the price in the absence of any effect produced by the forces of competition. Now in case of an agreement to fix the price of a commodity, if the parties to the agreement do not constitute so substantial a portion of the whole number of those dealing in such commodity, that the agreement, if executed, can have any material effect upon the price generally, it would seem to follow that there is no illegality in such agreement, there being neither actual injury nor tendency to injury.[1] But where such parties are

[1] This is the view taken in National Distilling Co. v. Cream City Importing Co., 86 Wis. 352; s. c., 56 N. W Rep. 864 (1893); Herriman v. Menzies, 115 Cal. 16; s. c., 46 Pac. Rep. 730 (1896). In Herriman v. Menzies it was applied to an agreement of an association of stevedores in San Francisco, "to govern and control the business of master stevedores, to be carried on by its members," with a provision for fixing prices to be charged by members, it not appearing that the parties controlled the business of stevedoring in San Francisco, to the extent of ability to exclude competition or control prices, or that they comprised more than an insignificant fraction of those engaged there in the business. So under the Federal anti-trust act, in United States v. Nelson, 52 Fed. Rep. 646 (Cir. Ct. Minn., 1892); Dueber Watch-case Manuf. Co. v. Howard Watch & Clock Co., 55 Fed. Rep. 851 (Cir. Ct. N. Y., 1893); 35 U. S. App. 16, 28; s. c., 66 Fed. Rep. 637, 644 (2d Cir., 1895); though see United States v. Trans-Missouri Freight Assoc., below. But under an express statutory prohibition of such agreements, it seems immaterial whether or not the parties constitute so substantial a portion. For instances of such prohibition see Clancey v. Onondaga Salt Manuf. Co., 62 Barb. (N. Y.) 395 (1862); also Beechley v.

the sole dealers in the commodity, or constitute so substantial a portion thereof that the agreement, if executed, will affect or tend to affect the price otherwise fixed by the forces of competition, it would seem to follow that the agreement is illegal, as producing the evils in view of which the doctrine against monopolies was established.[1] On this gen-

Mulville, 102 Iowa, 602; s. c., 70 N. W. Rep. 107 (1897; applying the prohibition of McClain's Code, § 5454, against fixing "the price of oil, lumber, coal, grain, flour, provisions, or any other commodity or article whatever," to a combination among fire insurance companies and agents to fix rates of insurance). So in United States v. Trans-Missouri Freight Assoc., 166 U. S. 290; s. c., 17 Supm. Ct. Rep. 540 (1897), an agreement among railroad corporations to establish and maintain rates was held to be "in restraint of trade or commerce," under the Federal anti-trust act.

[1] Thus, in Morris Run Coal Co. v. Barclay Coal Co., 68 Pa. St. 173, 186 (1871), the five coal companies which combined to fix the price of coal were the sole dealers in the region affected. The court say: "Singly each might have suspended deliveries and sales of coal, to suit its own interests, and might have raised the price, even though this might have been detrimental to the public interest. . . . But . . . this combination has a power in its confederated form which no individual action can confer. The public interest must succumb to it, for it has left no competition free to correct its baleful influence." So in Drake v. Siebold, 81 Hun (N. Y.), 178; s. c., 30 N. Y. Suppl. 697 (1894), the agreement to fix the price of coal, held illegal, was among all the coal dealers in Rochester, except a few small dealers who sold by the bushel. So held under the statute (now Penal Code, § 168, subd. 6) against a conspiracy "to commit any act injurious to trade or commerce." So in Hoffman v. Brooks, 23 Am. Law Reg. (N. S.) 648 (Super. Ct. Cinn., 1884), the agreement held illegal was among the owners of the leaf-tobacco warehouses in Cincinnati, for fixing rates of service, the business being of great magnitude in that city, and that being the largest market for such business in the United States. So in People v. Milk Exchange, 145 N. Y. 267; s. c., 39 N. E. Rep. 1062 (1895), though it does not clearly appear how large a percentage of the dealers were included in the combination in question, yet the prices of milk as fixed by it had "largely controlled the market in and about the city of New York, and of the milk-producing territory contiguous thereto." To the same rule seems referable Lovejoy v. Michels, 88 Mich. 15; s. c., 49 N. W. Rep. 901 (1891), where, in applying the rule that, in the absence of agreement as to the price of goods sold, the price shall be a reasonable one, it was held error to allow as the price, or even

eral ground is based the condemnation of what are known as "corners."[1] Obviously the answer to the question whether the parties constitute so substantial a portion of the dealers

consider as evidence of value, the price fixed by a combination of manufacturers, to which the plaintiff belonged, and which substantially controlled the supply. And the following are cases of agreements held illegal as fixing prices, where the parties seem, though it does not always clearly appear, to have constituted a substantial portion of the dealers in the commodity. But, if otherwise, they are to be classed with the cases cited in note 1, p. 156, below. Leonard v. Poole, 114 N. Y. 371; s. c., 21 N. E. Rep. 707 (1889; lard); De Witt Wire-Cloth Co. v. N. J. Wire-Cloth Co., 16 Daly, 529; s. c., 14 N. Y. Suppl. 277; affirmed, it seems, in 38 N. Y. State Reporter, 1023 (1891; wire-cloth); Richardson v. Buhl, 77 Mich. 632, 657; s. c., 43 N. W. Rep. 1102 (1889; friction matches); Cummings v. Foss, 40 Ill. App. 523 (1891); confirmed in subsequent decision in Foss v. Cummings, 149 Ill. 353; s. c., 36 N. E. Rep. 553 (1894; corn; the opinion was here expressed that the combination was in violation of the Illinois statute making it a penal offense to "corner the market or attempt to do so);" United States v. Addyston Pipe & Steel Co., 54 U. S. App. 723, 756; s. c., 85 Fed. Rep. 271, 288 (6th Cir., 1898). In National Harrow Co. v. Bement, 21 N. Y. App. Div. 290, 294; s. c., 47 N. Y. Suppl. 462 (1897), a provision in a license to manufacture and sell under a patent, whereby the licensor reserved the right to decrease the prices as fixed, was held illegal, against the contention that authority was not given to increase the price, it appearing that the prices as fixed were far above the selling price.

On the contrary, there are some comparatively early decisions that go to the extent of holding that an agreement to fix prices is not illegal, even if among those constituting a substantial portion of the dealers in the commodity. Thus, in Ontario Salt Co. v. Merchants' Salt Co., 18 Grant (Ontario), 540 (1871; salt), notwithstanding the admission that "prices might possibly be affected by it." So in Central Shade Roller Co. v. Cushman, 143 Mass. 353; s. c., 9 N. E. Rep. 629 (1887), of a combination among manufacturers and sellers of curtain fixtures known as "wood balance shade rollers," though they were the principal dealers and substantially supplied the market. So held even on the assumption that the agreement tended to raise the price. So in Dolph v. Troy Laundry Machinery Co., 28 Fed. Rep. 553 (Cir. Ct. N. Y., 1886), was sustained an agreement between two manufacturers of washing-machines, they being the principal, but not the only, manufacturers in this country, for a division of profits on sales, upon the basis of a fixed price. It is clear that these authorities would not now be generally followed.

[1] The transactions condemned as "cornering," in Samuels v. Oliver,

that the agreement, if executed, will affect or tend to affect the price, must frequently depend on the circumstances of the case. The distinction above stated has sometimes, however, been ignored, and the doctrine broadly stated that any agreement to fix the price of a commodity, at least of an article of necessity, is illegal.[1] We have still another class of cases that ignore the distinction and apply the test of reasonableness to the price as fixed, that is to say, uphold the agreement if the price as fixed is reasonable.[2] But in

130 Ill. 73; s. c., 22 N. E. Rep. 499 (1889), consisted of buying all the market supply of an article of staple necessity, and entering into contracts for the delivery of a larger amount than could, in the state of the market supply, be delivered. Here it was testified by the president of the Chicago Merchants' Exchange (p. 84): "By 'cornering the market,' I mean when parties have contracts on hand for a greater amount than the sellers have cash grain to deliver." In Wright v. Cudahy, 168 Ill. 86; s. c., 48 N. E. Rep. 39 (1897), a contract was held illegal, as in violation of § 130 of the Criminal Code, making it a crime to "forestall the market by spreading false rumors, to influence the price of commodities therein, or corner the market, or attempt to do so." In the testimony a corner was defined as "where somebody succeeds in buying for future delivery more property of a given kind, than is possible for the seller to deliver before the day of the maturity of the contract." Similarly a corner in wheat was condemned as illegal in Raymond v. Leavitt, 46 Mich. 447 (1881). See further as to corners, Wright v. Crabbs, 78 Ind. 487 (1881; wheat); Sampson v. Shaw, 101 Mass. 145 (1869; railroad stock); Foss v. Cummings, 149 Ill. 353; s. c., 36 N. E. Rep. 558 (1894; corn); Wells v. McGeoch, 71 Wis. 196; s. c., 35 N. W. Rep. 769 (1888). A corner is essentially the same as a pool or trust. But in a *corner* the element of raising price seems predominant; in a *pool*, that of dividing profits; in a *trust*, the particular relation of the parties.

[1] This seems to be the ground of the decision in More v. Bennett, 140 Ill. 69; s. c., 29 N. E. Rep. 888 (1892), declaring illegal an association of law stenographers, having as its object to control the prices to be charged by its members for stenographic work, by restraining all competition among them. And in the following cases it does not appear that the agreements condemned were among persons constituting a substantial portion of the dealers: Urmston v. Whitelegg, 63 L. T. R. (N. S.) 455 (1890; manufacturers of mineral waters); Sayre v. Louisville Union Benev. Assoc., note 2, p. 157, below.

[2] Thus, in Herriman v. Menzies, 115 Cal. 16; s. c., 46 Pac. Rep. 730 (1896), the agreement was sustained, it not appearing that the prices fixed were unreasonable, or the restriction "such as to

such cases, contrary to a rule already considered, the immediate and present effect seems to be relied on, without reference to remote and distant effects. In this connection we may profitably consider the true basis of the doctrine of the invalidity of agreements to fix wages, that is, the price of labor. The doctrine was originally established as an application of the general law of conspiracy. So far as it rests on that ground, it is, as we have elsewhere seen, been repudiated, if indeed it is to be regarded as ever having existed.[1] But there seems to be ground for saying that the validity of an agreement to fix wages, that is,the price of labor, should be determined like that of agreements generally to fix prices, that is, by determining whether the parties to the agreement constitute so substantial a portion of those furnishing the

preclude a fair competition with others engaged in the business," though there is another and distinct ground for the decision, namely, that the parties did not control the business. See note 1, p. 153, above. So, in Sayre v. Louisville Union Benev. Assoc., 1 Duvall (Ky.), 143 (1863), where a by-law of an association of captains and owners of steamboats on the Ohio and Mississippi rivers, forbidding any member to carry freight for "less than the established rate in the trade," was held illegal. Such rate seems to have been fixed by the association. The court say: "The members agreed that no one should carry freight for less than the rate fixed by the association, without reference to the question whether the rate was reasonable or not." So, in Ontario Salt Co. v. Merchants' Salt Co., 18 Grant (Ontario), 540, 544 (1871), the agreement was sustained as having for its object, "not unduly to enhance the price, but to enable the parties by concerted action to combat an attempt on the part of foreign producers and manufacturers unduly to depreciate it." As a rule, however, attempts to fix prices have been by legislatures rather than courts. That the existence of a monopoly in a business furnishes constitutional ground for legislation fixing prices therein, see Budd v. New York, 143 U. S. 517, 532; s. c., 12 Supm. Ct. Rep. 468 (1892). Compare Ladd v. Southern Cotton Press, etc. Co., 58 Tex. 172 (1880); Seeligson v. Taylor Compress Co., 56 Id. 219, 227 (1882). See, as to limits upon jurisdiction of States to control rates of transportation, in view of commerce clause of Federal constitution, Gulf, Colorado & Santa Fe Ry. Co. v. State, 72 Tex. 404; s. c., 10 S. W. Rep. 81 (1888), and of prohibition of fourteenth amendment, Smyth v. Ames, 169 U. S. 466; s. c., 18 Supm. Ct. Rep. 418 (1898).

[1] See § 7.

supply of labor, that the agreement, if executed, will affect or tend to affect the rate of wages otherwise fixed by the forces of competition.[1]

§ 28. Criminal liability for restricting competition.— In the view we have taken, an act illegal as against public policy involves the idea of a wrong committed against a considerable number of persons, vaguely designated as "the public."[2] The same may be said of an act illegal as a criminal act.[3] But not all acts illegal as against public policy are criminal. The precise line of distinction may not be easy to draw; the distinction seems to be one of degree rather than of kind. The border territory of doubtful cases includes, to some extent at least, acts illegal as producing or tending to produce restrictions upon competition. It seems clear, however, that not all such acts are criminal; and, indeed, the question of criminality has been raised only as to such acts as come under the description of forestalling, engrossing and regrating, which were for centuries statutory

[1] In this connection see Sayre v. Louisville Union Benev. Assoc., 1 Duvall (Ky.), 143 (1863), where, though the question was as to prices rather than wages, the court doubt the soundness of the extreme positions, on the one hand, that combinations to raise wages are legal, and, on the other hand, that they are not, applying the test of *reasonableness* of the wages sought to be obtained as a result of the combination. Here a by-law of an association forbidding members to carry freight for less than the rate fixed by the association, was held illegal, on the ground that the agreement had no reference to the question whether the rate was reasonable or not. Compare Queen Ins. Co. v. State, 86 Tex. 250, 272; s. c., 24 S. W. Rep. 397, 405 (1893). The distinction stated in the text was, however, disregarded in People v. Fisher, 14 Wend. (N. Y.) 9 (1835), holding unlawful a combination to raise wages. There was nothing to show that such combination tended to create a monopoly. The court state several hypothetical cases of monopolies produced by combinations to raise wages, and add: "Such consequences would follow were such combinations universal. It is true that no great danger is to be apprehended, on account of the impracticability of such universal combinations. But if universally, or even generally, entered into, they would be prejudicial to trade and to the public, *they are wrong in each particular case.*"

[2] See § 17.

[3] See 1 Bishop's New Criminal Law, §§ 231, 232.

offenses in England, a decision of the question whether they were criminal acts at common law being thus precluded.[1] In this country there seems to have been no serious attempt to enforce on common-law grounds any criminal liability for acts producing or tending to produce restrictions upon competition, though the opinion has frequently been expressed that such a liability exists.[2] Another source of such

[1] Though the question was not in the case, it seems to have been the view of the court in Mogul S. S. Co. v. McGregor, L. R. App. Cas. (1892), 25, 46, 58, that what are here called agreements "in restraint of trade" were not indictable at common law, questioning remarks of Crompton, J., in Hilton v. Eckersley, 6 El. & Bl. 47 (1855). Of forestalling, engrossing and regrating it is said in Bishop's New Criminal Law, § 518: "These are kindred offenses, indictable both under the ancient common law and by early English statutes, yet seldom made the subject of a criminal prosecution in modern times. And in England they were abolished in 1844, by 7 & 8 Vict., c. 24, both as common-law offenses and as statutory." The statutes against these offenses had been repealed by 12 Geo. 3, c. 71 (1772), but, according to King v. Waddington, 1 East, 143 (1800), they continued as common-law offenses. See also 2 Wharton's Criminal Law (10th ed.), §§ 1849–51. In Ontario Salt Co. v. Merchants' Salt Co., 18 Grant (Ontario), 540 (1871), an agreement among manufacturers of salt was held not illegal on the ground that its object was to raise the price, but the view is taken that, even if such acts were once illegal at common law, "long usage" has brought about a change in the common law in this respect. See Story on Sales (4th ed.), § 490; also article by W. F. Dana in 7 Harv. Law Rev. 338 (1894), where it is said that "at common law there was no such offense as 'monopolizing'" (p. 342), and it is denied that "engrossing" at common law had any relation to "monopolizing."

[2] See, for instance, Raymond v. Leavitt, 46 Mich. 447 (1881); Cummings v. Foss, 40 Ill. App. 523; affirmed in 149 Ill. 353; s. c., 36 N. E. Rep. 553 (1894); Strait v. National Harrow Co., 18 N. Y. Suppl. 224 (Supm. Ct., Sp. T., 1891). These were all proceedings to enforce a *civil* liability. It is said in Bishop's New Criminal Law, § 520: "It is reasonably plain that the common law of our States has not adopted these offenses in terms as thus defined, yet it does not follow that the principle from which the law proceeded has not become an inheritance with us. Modified, therefore, and thus adapted to our altered situation and circumstances, there is ground for deeming them criminal misdemeanors in States that recognize common-law crimes." See the elaborate discussion in Stickney's "State

opinion seems to be the exploded doctrine, elsewhere considered, of a criminal liability for combinations to raise wages.[1] Criminal liability for acts producing or tending to produce restrictions upon competition, now very generally exists in this country by virtue of statute.[2]

§ 29. Civil remedies in case of restriction upon competition; proceeding on behalf of public.— Leaving out of consideration remedies as between parties to an agreement in

Control of Trade and Commerce." In 2 Wharton's Precedents, No. 658, is a case of an indictment for a conspiracy among carriers to regulate the prices of transportation, sustained by Judge Grier, afterwards of the United States Supreme Court.

[1] See, for instance, Morris Run Coal Co. v. Barclay Coal Co., 68 Pa. St. 173, 187 (1871).

[2] In Leonard v. Poole, 114 N. Y. 371; s. c., 21 N. E. Rep. 707 (1889), is a *dictum* that a combination to advance the price of lard was indictable as a conspiracy to "commit any act injurious to trade or commerce" under the New York statute; and see cases cited. But the recent anti-trust acts much more explicitly create a criminal liability. See for instance as to indictment for conspiracy under the Mississippi act (Code, §§ 1007, 4437, subd. 9), American Fire Ins. Co. v. State, — Miss. —; s. c., 22 So. Rep. 99 (1897). So, mere contracts in restraint of trade, though creating no criminal liability at common law, commonly do, under the provisions of the anti-trust acts. Thus, under the Federal anti-trust act. See Re Greene, 52 Fed. Rep. 104, 111 (Cir. Ct. Ohio, 1892); United States v. Addyston Pipe & Steel Co., 54 U. S. App. 723, 742; s. c., 85 Fed. Rep. 271, 279 (6th Cir., 1898). See § 21. See as to requisites of indictment under such act, United States v. Greenhut, 50 Fed. Rep. 469 (D. Ct. Mass., 1892); Re Greene, above; United States v. Patterson, 55 Fed. Rep. 605, 641; Same v. Same, 59 Id. 280 (Cir. Ct. Mass., 1893). It is not sufficient to merely follow the words of the act. United States v. Nelson, 52 Fed. Rep. 646 (Cir. Ct. Minn., 1892); United States v. Patterson, 55 Fed. Rep. 605, 638 (Cir. Ct. Mass., 1893); Re Greene, above. That as a penal statute it is to be strictly construed, see § 20. Anti-trust acts commonly contain prohibitions of *conspiracies* to commit the acts in question. See generally, as to the doctrine of criminal conspiracy, § 8. In Hathaway v. State, 36 Tex. Crim. Rep. 261; s. c., 36 S. W. Rep. 465 (1896), a mere agent was held improperly convicted for engaging in a "conspiracy against trade," in violation of the Texas Penal Code, § 981. In Re Grice, 79 Fed. Rep. 627, 638 (Cir. Ct. Tex., 1897), the provision of the Texas anti-trust act of 1889, by which it is attempted to claim jurisdiction for offenses committed outside the State, was held inoperative and void.

restriction of competition, as a rule no civil liability results merely from the existence of such a restriction.[1] It is true that an injury is regarded as resulting to a large number of persons vaguely designated as "the public;" nevertheless,

[1] See Olmstead v. Distilling & Cattle-Feeding Co., 77 Fed. Rep. 265 (Cir. Ct. Ill., 1896). So held that no action would lie against the members of a combination illegal as in restriction of competition, for a refusal to sell to the plaintiff. Brewster v. Miller, — Ky. —; s. c., 41 S. W. Rep. 301 (1897). Analogous are the decisions to the effect that a contract in restraint of trade is not actionable at the instance of third parties; thus, Bohn Manuf. Co. v. Hollis, 54 Minn. 223, 234; s. c., 55 N. W. Rep. 1119 (1893), where the court say: "The courts sometimes call such contracts 'unlawful' or 'illegal,' but in every instance it will be found that these terms were used in the sense merely of 'void' or 'unenforceable' as between the parties; the law considering the disadvantage so imposed upon the contract a sufficient protection to the public." See also remarks of Lord Watson in Mogul S. S. Co. v. McGregor, L. R. App. Cas. (1892), 25, 42; also Continental Ins. Co. v. Board of Fire Underwriters, 67 Fed. Rep. 310, 318 (Cir. Ct. Cal., 1895); Dueber Watch-case Manuf. Co. v. Howard Watch & Clock Co., 3 Misc. (N. Y.) 582 (Supm. Ct., Sp. T., 1893); United States v. Addyston Pipe & Steel Co., 54 U. S. App. 723, 742; s. c., 85 Fed. Rep. 271, 279 (6th Cir., 1898). By the Federal anti-trust act a right of action is given to "any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful" by such act (§ 7). In such an action it must appear that the plaintiff is or has been engaged in interstate trade and commerce. Dueber Watch-case Manuf. Co. v. Howard Watch & Clock Co., 55 Fed. Rep. 851 (Cir. Ct. N. Y., 1893). In Bishop v. American Preservers' Co., 51 Fed. Rep. 272 (Cir. Ct. Ill., 1892), such an action was held not maintainable, the only ground thereof being the bringing of two suits that had not been decided, there being no allegation that the goods manufactured by the plaintiff were a subject of interstate commerce, and it not appearing that the suits complained of had anything to do with an alleged contract in restraint of trade. The declaration was also defective for omitting averments of requisite citizenship. In Dueber Watch-case Manuf. Co. v. Howard Watch & Clock Co., 35 U. S. App. 16, 23; s. c., 66 Fed. Rep. 637, 641 (2d Cir., 1895), a complainant declaring under this act was not allowed to turn the action into a common-law one, for the purpose of claiming jurisdiction over the defendant. For another instance of an unsuccessful action brought under such act, see Lowenstein v. Evans, 69 Fed. Rep. 908 (Cir. Ct. So. Car., 1895). Bratt v. Swift, — Wis. —; s. c., 75 N. W. Rep. 411 (1898), furnishes an instance of an action held maintain-

the injury to any given individual is comparatively insignificant, and great inconvenience would result from the recognition of a remedy in favor of each one of so large a number.[1] But, in accordance with the general doctrine allowing, on behalf of the public, a remedy against an act producing injury to the public, as in case of what is known as a public nuisance,[2] it would seem to follow that a proceeding may be maintained on behalf of the public for relief against such restriction. The attorney-general is the proper officer to institute such a proceeding. Rarely, if ever, would an action at law for damages be an adequate remedy in such a case, and, in accordance with the rules applicable to the granting of injunctions, an injunction on the application of the attorney-general is ordinarily the proper proceeding.[3] This proceeding has,

able under the Wisconsin anti-trust act for damages caused by a "conspiracy in restraint of trade." The damages recoverable by the plaintiff were declared to be "such sum as he had suffered in his business, and the consequent diminished value of the use of his property, by reason of the wrongful acts of the defendants;" but it was held error to admit evidence, as bearing on the question of damages, of the value of the several articles or pieces of property which he sold, and the prices for which he sold them when he sold out his business.

[1] Thus it is said in 4 Blackstone's Commentaries, p. 167: "It would be unreasonable to multiply suits, by giving every man a separate right of action, for what damnifies him in common only with the rest of his fellow subjects."

[2] As to the remedy in case of a public nuisance, see 1 High on Injunctions (3d ed.), §§ 759–771.

[3] Thus, in Attorney-General v. Great Northern Ry. Co., 1 Drewry & Smale, 154 (1860), a railway company was enjoined from carrying on the business of coal merchants, the court saying: "These companies being armed with the power of raising large sums of money, if they were allowed to apply their funds to purposes other than those for which they were constituted, might acquire such a preponderating influence and command over some particular branch of trade or commerce, as would enable them to drive the ordinary private traders out of the field, and create in their own favor a practical monopoly, whereby the interests of the public would be most seriously injured." Similarly, in Stockton v. Central R. R. Co. of N. J., 50 N. J. Eq. 52; s. c., 24 Atl. Rep. 964 (1892), an injunction was granted, on the application of the attorney-general, against a railroad corporation leasing its road to another, such lease

however, been rarely resorted to, a preference being shown for the more drastic remedy of a proceeding for the dissolution of the corporation or corporations, which, as we shall see elsewhere, is ordinarily the agency producing the restriction.[1] But, as the application of this severe remedy deprives

being part of a scheme to secure a monopoly of the Pennsylvania anthracite coal traffic.

But the distinction between an injury to a mere individual, and an injury to the public, was overlooked in Queen Ins. Co. v. State, 22 S. W. Rep. 1048 (Tex. Civ. App., 1893); reversed, however, in 86 Tex. 250, 274; s. c., 24 S. W. Rep. 397 (1893). Here, in a proceeding by *the State*, the combination to which the corporation in question was a party, was held not to be illegal. But, on the assumption that it was a combination illegal as in restriction of competition, the relief demanded, for forfeiture of the right to do business in Texas, and for an injunction against carrying out the agreement, was regarded as improper. This on the general ground that granting such relief would be a departure from the rule that a court of equity will leave parties to an illegal contract as they have left themselves. The distinction was also overlooked in Stockton v. American Tobacco Co., 55 N. J. Eq. 352; s. c., 36 Atl. Rep. 971 (1897), where an injunction to restrain a corporation from conducting its business in a certain manner, was refused on the ground that it would have been lawful for an individual to conduct his business in the same manner. It disposed of its goods through "consignment agreements" with "jobbers." The court say (p. 363): "Assume that it appears that the company has so enforced its consignment agreement as to make it practically impossible for any jobber to handle its goods, and at the same time to deal in goods made by others; and assume that from such conduct the alleged consequences flow, the query remains, what power has this court to interfere at the instance of either the attorney-general or of any jobber? If the conduct now the subject of complaint had been that of an individual manufacturer instead of a corporation, I do not imagine that any lawyer would think of pressing before any court the proposition that such conduct could be enjoined. An individual manufacturer can sell his manufactured stock to whom he pleases, on any terms he pleases, and can refuse to sell to any one with whom, for his own reasons, however capricious, he does not care to deal. He can select his agents to sell his goods, and fix any rate of commissions. He can accompany his consignment to such agent with such restrictions as to the price or the terms of sale, or in respect to the parties to whom he may sell, as he pleases. Within these limits the power of an owner of manufactured goods is absolute." But suppose such individual man-

[1] See § 31.

the corporation of power for good as well as for ill, there would seem to be, on principle, strong grounds for applying the remedy by injunction, so that the corporate existence may be preserved for legitimate purposes.

ufacturer, by the extent and variety of his operations, to be able to control the trade? The question might then well arise whether an injunction might not issue against him. As it is, the case supposed by the court is not parallel with that before it. The court distinguish cases wherein a court of equity has enjoined the acts of a corporation as cases (p. 365) "where *quasi*-public corporations have acted outside of the scope of their charter privileges, or have violated an implied limitation upon its general power, so as to create a nuisance or a public injury." (Distinguishing Stockton v. Central R. R. Co., p. 162, above, as a case of an *ultra vires* agreement.) But is this not begging the question? Whatever the character of the business, is it not outside the scope of the charter powers, to constitute a monopoly? Furthermore, although the question has generally arisen in connection with *quasi*-public corporations, it is clear that the decisions have not, as a rule, been based on the circumstance of a corporation being a *quasi*-public one, nor even, it would seem, on the circumstance of the acts in question being those of a corporation. The court held that the result could not be evaded by enjoining the officers individually, instead of restraining the corporation. But in People ex rel. v. American Tobacco Co., 2 Chicago L. J. Weekly (Cook Co. Cir. Ct., 1897?), an injunction was granted to restrain the same corporation (here a foreign one) from transacting business.

By the Federal anti-trust act the circuit courts have jurisdiction to "prevent and restrain violations" of the act, such proceedings to be instituted by "the several district attorneys of the United States in their respective districts under the direction of the attorney-general." (§ 4.) Injunctions under this provision were allowed in United States v. Elliott, 62 Fed. Rep. 801 (Cir. Ct. Mo., 1894); United States v. Trans-Missouri Freight Assoc., 166 U. S. 290; s. c., 17 Supm. Ct. Rep. 540 (1897); United States v. Coal Dealers' Assoc., 85 Fed. Rep. 252, 259 (Cir. Ct. Cal., 1898). In the case last cited, it was intimated that under this provision a temporary restraining order may be issued without notice, "under the circumstances sanctioned by the established usages of equity practice," with a query whether, for the purpose of obtaining such an order, it is necessary to show that irreparable injury will result from delay, the case involving a question of monopoly and restraint of trade. See as to the application of the rule allowing some of numerous parties to be brought in as representing the whole. So, in United States v. Debs, 64 Fed. Rep. 724 (Cir. Ct. Ill., 1894), the defendant was held guilty of contempt for violating such an injunction. But the right to an injunction under this pro-

§ 30. The same; remedies as between parties.— The remedy just considered is available against a corporation or a mere individual, independently of whether the restriction is the result of an agreement. But such restrictions are commonly the result of agreement, and the existence of such an agreement gives rise to the question of the existence of remedies as between such parties.[1] In accordance with the doctrine applicable generally to agreements illegal as against public policy, no proceeding, whether legal or equitable, can be maintained, as between such parties, to enforce any provision of the agreement,[2] though it may be otherwise as to

vision is limited to the government; it cannot be exercised by a private citizen, his remedy being limited to an action for damages under § 7. (See note 1, p. 161, above.) Blindell v. Hagan, 54 Fed. Rep. 40 (Cir. Ct. La., 1893); affirmed as Hagan v. Blindell, in 13 U. S. App. 354; s. c., 56 Fed. Rep. 696 (5th Cir., 1893); Pidcock v. Harrington, 64 Id. 821 (Cir. Ct. N. Y., 1894); Greer v. Stoller, 77 Id. 1 (Cir. Ct. Mo., 1896); Gulf, Colorado & Santa Fe Ry. Co. v. Miami Steamship Co., 52 U. S. App. 732, 758; s. c., 86 Fed. Rep. 407, 420 (5th Cir., 1898). Under the requirement of § 6 of the act, as to seizure and condemnation of property in transportation from one State to another, or to a foreign country, held, that property could not be forfeited in a proceeding under the statute for an injunction. The court say: "This involves a trial by jury." United States v. Addyston Pipe & Steel Co., 54 U. S. App. 723, 776; s. c., 85 Fed. Rep. 271, 301 (6th Cir., 1898). See Currier v. Concord R. R. Co., 48 N. H. 321 (1869), as to relief in equity to an individual under the New Hampshire statute against railroad monopolies.

[1] Of course such questions do not arise in case of a restriction resulting solely from the action of an individual, as distinguished from a combination. See Oliver v. Gilmore, 52 Fed. Rep. 562 (Cir. Ct. Mass., 1892).

[2] Judd v. Harrington, 139 N. Y. 105; s. c., 34 N. E. Rep. 790 (1893); Richardson v. Buhl, 77 Mich. 633, 651; s. c., 43 N. W. Rep. 1102 (1889; action for amount claimed to be due under an agreement among stockholders for winding up the business of a corporation, for the purpose of uniting it with other interests); Hartford & New Haven R. R. Co. v. N. Y. & New Haven R. R. Co., 3 Robt. (N. Y.) 411 (1865); Burlington, C. R. & N. Ry. Co. v. Northwestern Fuel Co., 31 Fed. Rep. 652 (Cir. Ct. Minn., 1887); National Harrow Co. v. Bement, 21 N. Y. App. Div. 290, 297; s. c., 47 N. Y. Suppl. 462 (1897); National Harrow Co. v. Hench, 76 Fed. Rep. 667 (Cir. Ct. Pa., 1896); Central Ohio Salt Co. v. Guthrie, 35 Ohio St. 666 (1880); More v. Bennett, 140 Ill. 69;

a proceeding in disaffirmance of the agreement.[1] It is sometimes a matter of difficulty to determine whether a person

s. c., 29 N. E. Rep. 888 (1892); Chippewa Lumber Co. v. Tremper, 75 Mich. 36; s. c., 42 N. W. Rep. 532 (1889; covenant in deed against sale of liquor); Urmston v. Whitelegg, 63 L. T. R. (N. S.) 455 (1890). Thus, recovery for profits or earnings claimed to be due, was refused in Hooker v. Vandewater, 4 Denio (N. Y.), 349 (1847); Stanton v. Allen, 5 Denio (N. Y.), 434 (1848); Morris Run Coal Co. v. Barclay Coal Co., 68 Pa. St. 173, 188 (1871); Craft v. McConoughy, 79 Ill. 346 (1875); Nester v. Continental Brewing Co., 161 Pa. St. 473; s. c., 29 Atl. Rep. 102 (1894); Texas & Pacific Ry. Co. v. Southern Pacific Ry. Co., 41 La. Ann. 970; s. c., 6 So. Rep. 888 (1889); Emery v. Ohio Candle Co., 47 Ohio St. 320; s. c., 24 N. E. Rep. 660 (1890); Vulcan Powder Co. v. Her-

[1] See generally, as to proceedings in disaffirmance of an illegal agreement, Clark on Contracts, § 212. See Strait v. National Harrow Co., 18 N. Y. Suppl. 224 (Supm. Ct., Sp. T., 1891). In Phœnix Bridge Co. v. Keystone Bridge Co., 142 N. Y. 425, 431; s. c., 37 N. E. Rep. 562 (1894), relief as between parties to a combination concededly illegal as in restriction of competition, was denied on the ground that there appeared no disaffirmance of the agreement by the plaintiff. Recovery back of money deposited and forfeited under such an agreement, was not allowed in De Witt Wire-Cloth Co. v. New Jersey Wire-Cloth Co., 16 Daly, 529; s. c., 14 N. Y. Suppl. 277; affirmed, it seems, in 38 N. Y. State Reporter, 1023 (1891). So of money advanced in promotion of an illegal cornering transaction, in Raymond v. Leavitt, 46 Mich. 447 (1881; where it seems that the party advancing the money was to share in the profits); Cummings v. Foss, 40 Ill. App. 523 (1891); confirmed in subsequent decision in Foss v. Cummings, 149 Ill. 353; s. c., 36 N. E. Rep. 553 (1894; so also as to services rendered). So of amounts paid as membership fees in association, in Griffin v. Piper, 55 Ill. App. 213 (1894). In Pittsburg Carbon Co. v. McMillin, 119 N. Y. 46; s. c., 23 N. E. Rep. 530 (1890), as against the receiver of an illegal trust combination, a party to the combination, who had assigned a contract to the combination, was held not entitled to the proceeds of the contract. This on the ground that the receiver united in himself, not only the right of the trust combination, but the right of creditors. In Merz Capsule Co. v. United States Capsule Co., 67 Fed. Rep. 414 (Cir. Ct. Mich., 1895), one party was held not entitled to relief founded on the contract, but, upon the restoration by it of what it had received under the contract, it was held entitled to have such of the other parties as threatened to invade its property, restrained from interfering therewith. See also as to the duty to restore, Western Union Tel. Co. v. Burlington & S. W. Ry. Co., 11 Fed. Rep. 1 (Cir. Ct. Iowa, 1882).

is a party to the agreement, for the purpose of the application of this rule. Obviously, as a general rule, remedies as

cules Powder Co., 96 Cal. 510; s. c., 31 Pac. Rep. 581 (1892); Texas Standard Oil Co. v. Adoue, 83 Tex. 650; s. c., 19 S. W. Rep. 274 (1892); Chicago, Milwaukee & St. Paul Ry. Co. v. Wabash, St. Louis & Pacific Ry. Co., 27 U. S. App. 1; s. c., 61 Fed. Rep. 998 (8th Cir., 1894). In the case last cited the court condemn, as "not supported by the authorities" and as "unsound in principle," Central Trust Co. v. Ohio Central Ry. Co., 23 Fed. Rep. 806 (Cir. Ct. Ohio, 1885), where recovery was allowed for the amount due under a railroad pooling contract, "*without regard to the questions made as to the original validity of the contract.*" The court say: "The contract itself was a customary one among railroads, and the receiver believed it to be reasonable and fair, and that it was expedient to continue it in force. Good faith requires that the proceeds arising from its operation, and which, by its terms, belong to the petitioner, should be paid over to it." Compare, as to right to share in profits of such a contract, Cutting v. Florida Ry. & Nav. Co., 48 Fed. Rep. 508 (Cir. Ct. Fla., 1891). The doctrine is sometimes declared by statute, as in the provision of the Texas anti-trust act that "any contract or agreement in violation of the provisions of this act shall be absolutely void, and not enforceable at law or in equity." For applications thereof see Texas & Pacific Coal Co. v. Lawson, 89 Tex. 394; s. c., 34 S. W. Rep. 919 (1896); reversing 10 Civ. App. 491; s. c., 31 S. W. Rep. 843 (1895); Fuqua v. Pabst Brewing Co., 90 Tex. 298; s. c., 38 S. W. Rep. 29 (1897); Texas Brewing Co. v. Templeman, 90 Tex. 277; s. c., 38 S. W. Rep. 27 (1896).

On the same general ground the right to maintain a proceeding to enforce the provisions of an agreement, was, under varying conditions, denied in the following cases: In Unckles v. Colgate, 148 N. Y. 529; s. c., 43 N. E. Rep. 59 (1896), the holder of a certificate issued by a trust, was not allowed to maintain an action for winding up the affairs of the trust, an accounting by the trustees under the trust agreement, the appointment of a receiver, and the distribution through the receiver of all moneys, and of the proceeds of property, that came into the defendant's hands. Here the plaintiff had purchased the certificates subsequently to the formation of the trust, and it is intimated that his position was less favorable than that of one a stockholder and party to the original agreement. The decision was based on the ground that, having voluntarily made himself a party to a scheme under an executed agreement, which he alleged to be illegal, he could not claim the benefit of such illegal agreement. In Greer v. Payne, 4 Kan. App. 153; s. c., 46 Pac. Rep. 190 (1896), a suit by a member of an unincorporated voluntary association of live-stock dealers, to en-

between a third person and a party to an agreement in restriction of competition, are enforceable, notwithstanding

join the enforcement against him of penalties imposed by the rules of the association, was held not maintainable. This on the ground that the contract of membership was an unlawful combination, under L. 1891, ch. 158, and no rights could grow out of it, even membership therein being a misdemeanor. So held, notwithstanding the contention that the granting of the relief would be a virtual wiping out of the illegal by-laws of the association, leaving the exchange, with its members, to conduct their business under valid and lawful rules and regulations. In Greer v. Stoller, 77 Fed. Rep. 1 (Cir. Ct. Mo., 1896), the same result was reached on the same state of facts, but on a somewhat different ground, namely, that the plaintiff could not claim the rights of membership, without submitting to the rules which, on becoming a member, he had agreed to observe, the validity of the contract of membership not being involved. In Milwaukee Masons & Builders' Assoc. v. Niezerowski, 95 Wis. 129; s. c., 70 N. W. Rep. 166 (1897), an action was held not maintainable on a note given by a member of an association of mason contractors, the only consideration therefor being the benefits and advantages (such as rebates on material) which he was entitled to receive as a member, as a result of conducting its business, which was illegal as preventing competition. In American Biscuit & Manuf. Co. v. Klotz, 44 Fed. Rep. 721 (Cir. Ct. La., 1891), the illegality of a trust combination was held ground for refusing its application for the appointment of a receiver, in a proceeding against a constituent concern for an accounting. Opposed to the authorities generally seems to be National Wall Paper Co. v. Hobbs, 90 Hun, 288; s. c., 35 N. Y. Suppl. 932 (1895), holding that the defendant could not, while retaining the fruits of the contract, set up that it was an unlawful conspiracy to raise the price of goods and lower wages. This decision was followed in Noble v. McGurk, 16 Misc. (N. Y.) 461; s. c., 39 N. Y. Suppl. 921 (Supm. Ct., Sp. T., 1896), a case of an alleged agreement not to bid at a partition sale. The rule that relief may be granted as between parties not *in pari delicto*, seems to have been applied in an extreme case, in Manchester & Lawrence R. R. v. Concord R. R., 66 N. H. 100, 131; s. c., 20 Atl. Rep. 383 (1890), where, as between railroad companies, parties to an agreement invalid as a monopoly by statute, but not at common law, relief was granted. If, as between the parties, an agreement in restriction of competition is non-enforceable, it seems to follow that its existence furnishes no obstacle to one of such parties entering into an agreement with a third party in conflict with the provisions of the original agreement. Thus, in Cleveland, Columbus, Cincinnati, etc. Ry. Co. v. Closter, 126 Ind. 348, 359; s. c., 26 N. E. Rep. 159 (1890),

such agreement.[1] And this is so whether or not the remedy sought is for breach of an agreement. But an agreement

a combination among carriers, illegal as restricting competition, was held to create no legal obstacle to a contract between a shipper, and one of the parties to the combination, providing for a rate lower than that provided by the agreement among the carriers.

[1] Thus, the remedy for infringement of a patent, is not impaired by the circumstance that the holder of the patent is a party to an agreement in restriction of competition in the business to which the patent relates. Strait v. National Harrow Co., 51 Fed. Rep. 819 (Cir. Ct. N. Y., 1892; injunction to restrain such a suit denied); Sawyer-Man Electric Co. v. Edison Electric Light Co., 11 U. S. App. 712, 747; s. c., 53 Fed. Rep. 592, 598 (2d Cir., 1892). So held no defense to a proceeding to enforce liability for services rendered by tugs, that the tug-owners were parties to such an agreement. The Charles E. Wisewall, 74 Fed. Rep. 802 (D. Ct. N. Y., 1896); affirmed in 57 U. S. App. 179; s. c., 86 Fed. Rep. 671 (2d Cir., 1898). So such a defense is not available in a proceeding to enforce liability to pay for goods purchased. National Distilling Co. v. Cream City Importing Co., 86 Wis. 352; s. c., 56 N. W. Rep. 864 (1893). On the same principle in Dennehy v. McNulta, — U. S. App. —; s. c., 86 Fed. Rep. 825 (7th Cir., 1898), was denied the right to recover back money paid to an illegal combination. But such a defense has in some cases been made available by statute. See, in Ford v. Chicago Milk Shippers' Assoc., 155 Ill. 166; s. c., 39 N. E. Rep. 651 (1895), an application of the provision of the Illinois anti-trust act of 1891, that the purchaser from one transacting business contrary to its provisions, should not be liable for payment. See, however, Wiley v. National Wall Paper Co., 70 Ill. App. 543 (1896). The provision of the Kansas anti-trust act of 1889, making it a defense that the plaintiff is a member or agent of a combination unlawful under the act, was held, notwithstanding the generality of the language, not to apply, where it did not appear that the contract and transactions upon which the action was based, formed any part of the illegal combination, or promoted it in effect or design; and, furthermore, the plaintiff was merely a small stockholder in a corporation that was a party to the combination. Barton v. Mulvane, — Kan. —; s. c., 52 Pac. Rep. 883 (1898). In an action by a foreign corporation to enforce a stockholder's liability, held, that the question whether it had forfeited its franchises by entering into an illegal trust combination, could not be raised. United States Vinegar Co. v. Schlegel, 67 Hun (N. Y.), 356; s. c., 22 N. Y. Suppl. 407 (1893). Held, also, that it could not be shown that it was orally agreed among the promoters, that the organization should be for an illegal purpose. Id.; Globe Sewer Pipe Co. v. Otis, 22 N. Y. Suppl. 411 (Supm. Ct., Gen. T., 1893).

between a third person and a party to the agreement in restriction of competition, may be so related to the latter agreement, as to make such third person a party to it, within the operation of the rule preventing the maintenance of a proceeding between parties to enforce such an agreement.[1]

[1] In Bishop v. American Preservers' Co., 157 Ill. 284, 306; s. c., 41 N. E. Rep. 765 (1895), in an action of replevin, it appearing that the plaintiff was a party to an illegal combination in restraint of trade, held error to exclude evidence offered to sustain a defense that "the transfer of defendant's goods and machinery and business, by means of a bill of sale to the plaintiff, and the delivery of the shares of stock to defendant, and the redelivery thereof to the trustees of the combination in exchange for trust certificates, and the appointment of defendant as custodian of the property and agent to carry on the business, theretofore exclusively his own, were all parts of the illegal scheme, and aids in the accomplishment of the unlawful objects of the trust." So, in Arnot v. Pittston & Elmira Coal Co., 68 N. Y. 558, 566 (1877), recovery was not allowed for coal sold under an agreement that was part of an illegal scheme of the buyer to enhance prices. It bound the buyer to take all the coal that the seller might desire to send "north of the State line," to the extent of two thousand tons a month, it being, however, optional with the seller to deliver, and the only consideration for the agreement of the buyer being the agreement of the seller not to sell coal to any other party, to come north of the State line. To the knowledge of the seller, the design of the buyer was to control the supply and price of coal, and but for that purpose the buyer would not have entered into the agreement. The product of the seller largely exceeded two thousand tons a month. The court say: "Under certain limitations, a vendor of goods may recover for their price, notwithstanding that he knows that the vendee intends an improper use of them, so long as he does nothing to aid in such improper use, or in the illegal plan of the purchaser. But if the vendor does anything beyond making the sale, to aid the illegal scheme of the vendee, he renders himself *particeps criminis*, and cannot recover for the price." In Clancey v. Onondaga Salt Manuf. Co., 62 Barb. (N. Y.) 395 (1862), recovery was not allowed for the price of salt sold to a corporation formed ostensibly for the purpose of manufacturing salt, but in reality to form a combination to fix and control the price, it appearing that the sellers knew that the object of the combination was to increase the price, and that they were to receive the benefit of it. But in Carter-Crume Co. v. Peurrung, — U. S. App. —; s. c., 86 Fed. Rep. 439 (6th Cir., 1898), was sustained an agreement for the sale of the entire product of the seller, in the absence of knowledge by him that this was

So, as a rule, an agent of a party to an agreement in restriction of competition, is not himself a party, so as to be within the operation of the rule just considered.[1] Besides the difficulty of determining whether a person is a party to the agreement, it is sometimes a matter of difficulty to deter-

intended by the buyer as but one step in such an illegal combination. And in Van Marter v. Babcock, 23 Barb. (N. Y.) 633 (1857), an agreement of sale was held not illegal merely by reason of a provision that it should be void, provided the other growers of the same product should not enter into an agreement with the buyer. In Anheuser-Busch Brewing Assoc. v. Houck, 27 S. W. Rep. 692 (Tex. Civ. App., 1894); affirmed as Houck v. Anheuser-Busch Brewing Assoc., in 88 Tex. 184; s. c., 30 S. W. Rep. 869 (1895), the illegality of an agreement, under the Texas anti-trust act of 1889, was held to justify a refusal to carry out an agreement to sell to such parties, but not to prevent recovery for goods sold, though with knowledge that they were to be used for the purposes of such combination. This on the ground that the buyer could claim no benefits under the contract, though it might be valid as to the seller. See as to effect of knowledge of seller that goods are to be used for an unlawful purpose, Oliver v. Gilmore, 52 Fed. Rep. 562 (Cir. Ct. Mass., 1892).

[1] See generally as to liability of agents of such parties, Clark on Contracts, § 213. In Murray v. Vanderbilt, 39 Barb. (N. Y.) 140, 152 (1863), recovery was allowed against an agent for money received by him for the principal's use, against the objection that the money was paid on an agreement illegal as in restriction of competition. In Wright v. Crabbs, 78 Ind. 487 (1881), recovery was allowed for services as broker in procuring contracts for the purchase of wheat, in ignorance of the fact that the employer was utilizing such contracts for creating a "corner" in the wheat. But in Samuels v. Oliver, 130 Ill. 73; s. c., 22 N. E. Rep. 499 (1889), recovery was not allowed, either by agent against principal, or *vice versa*, for money received or advanced in promotion of a "cornering" transaction. And in Gibbs v. Consolidated Gas Co. of Baltimore, 130 U. S. 396; s. c., 9 Supm. Ct. Rep. 553 (1889), recovery was not allowed for services rendered in negotiating a contract known by the plaintiff to be illegal. And in Leonard v. Poole, 114 N. Y. 371; s. c., 21 N. E. Rep. 707 (1889), an action for an accounting was held not maintainable, notwithstanding the objection that the parties from whom the accounting was sought, were mere agents of the others; this on the ground that the parties, being engaged in a criminal scheme to advance prices, were all principals. But this reasoning seems inconclusive, the proceeding being for the enforcement, not of a criminal, but of a *civil* liability. See also Keene v. Kent, 4 N. Y. State Reporter, 431 (Supm. Ct., Gen. T., 1886), where the same contract was involved.

mine whether an agreement is such as to be within the operation of the rule. Ordinarily this is to be determined by the rules generally applicable in determining whether an agreement is illegal as in restriction of competition. But where there exists a concededly illegal restriction upon competition, the question sometimes arises whether an agreement is so related to the illegal restriction, as to partake of its illegality. If so, it comes within the operation of the rule above considered;[1] otherwise, not.[2]

[1] See on the general subject of agreements partly illegal, Clark on Contracts, § 204, and other treatises on contracts generally. Thus, in Santa Clara Valley Mill & Lumber Co. v. Hayes, 76 Cal. 387; s. c., 18 Pac. Rep. 391 (1888), recovery was not allowed for breach of an agreement by a manufacturer of lumber for sale thereof, it appearing that the agreement was part of a scheme on the part of the plaintiff, to form a combination among all the manufacturers of lumber in the vicinity, for the purpose of increasing the price, limiting the supply, and giving the plaintiff the control thereof. By the agreement the defendant was not to manufacture other lumber to be sold in the region, under a penalty. The scheme included similar contracts between the plaintiff and other manufacturers in the region. So in Pacific Factor Co. v. Adler, 90 Cal. 110; s. c., 27 Pac. Rep. 36 (1891), recovery was not allowed for breach of an agreement to sell and deliver 187,500 grain bags or burlaps, it appearing that the agreement was part of a scheme on the part of the plaintiff to control the supply of grain bags within the State, for the purpose of increasing the price. In Drake v. Siebold, 81 Hun (N. Y.), 178; s. c., 30 N. Y. Suppl. 697 (1894), a case of

[2] For examples of provisions held enforceable as separable from agreements in restriction of competition, see Hartford & New Haven R. R. Co. v. N. Y. & New Haven R. R. Co., 3 Robt. (N. Y.) 411 (1865); Western Union Tel. Co. v. Burlington & S. W. Ry. Co., 11 Fed. Rep. 1 (Cir. Ct. Iowa, 1882). See Hoffman v. Brooks, 23 Am. Law Reg. (N. S.) 648 (Super. Ct. Cinn., 1884). For a case where an accounting was allowed for money received as profits on an illegal cornering contract, see Wells v. McGeoch, 71 Wis. 196; s. c., 35 N. W. Rep. 769 (1888). In Sampson v. Shaw, 101 Mass. 145 (1869), where the agreement between parties to a cornering agreement was, that one should apply the funds of the other already in his hands, so far as should be necessary for the payment of the latter's share of the expenses, the latter was held not precluded from recovering the unexpended balance of the fund, but not allowed to recover for what had actually been expended.

§ 31. Restrictions by corporations upon competition.—Formerly, at least, an illegal restriction upon competition was commonly the result of acts of a combination of individuals, partnerships or corporations. But it is frequently overlooked

an illegal combination among coal dealers to fix the price, a contract between two parties thereto for the sale of coal at the price fixed by the combination, was held non-enforceable, though it was intimated that the seller was not necessarily precluded from all remedy for non-payment of coal delivered under the contract. So in Burlington, C. R. & N. Ry. Co. v. Northwestern Fuel Co., 31 Fed. Rep. 652 (Cir. Ct. Minn., 1887), an agreement to make a special rate for shipments of coal reaching a certain amount, being held void, as in restriction of competition, was also held not separable from a provision in the same agreement, not to ship less than a certain amount for less than a certain rate. So in State v. Nebraska Distilling Co., 29 Neb. 700; s. c., 46 N. W. Rep. 155 (1890), a conveyance of property was held illegal, as made to a combination formed to restrict competition. So in Houck v. Anheuser-Busch Brewing Assoc., 88 Tex. 184; s. c., 30 S. W. Rep. 869 (1895), an agreement by a seller to sell to none but the buyer, was held illegal, as calculated to aid the buyer in producing an illegal restriction upon competition, overruling on this point decision below in 27 S. W. Rep. 692 (Tex. Civ. App., 1894). In National Harrow Co. v. Hench, 84 Fed. Rep. 226 (Cir. Ct. N. Y., 1898), a suit between the same parties as in 76 Fed. Rep. 667; 83 Fed. Rep. 36 (for facts see § 22), a suit upon the theory that, holding the legal title to the patents, the complainant could sue the owners of the equitable title, not as licensees, but as infringers, was held not maintainable, the assignment under which the complainant claimed being regarded as part of the general illegal scheme.

It may be a question whether the rule that an agreement, legal considered by itself, may be illegal by means of its relation to an illegal restriction upon competition, was not overlooked in the decisions sustaining agreements by which purchasers from the combination known as the Distilling and Cattle Feeding Company, were to receive rebates, provided they purchased exclusively from such combination. Stress is laid in such decisions on the circumstance that it was merely *optional* with the purchaser to so purchase exclusively. Re Corning, 51 Fed. Rep. 205, 211 (D. Ct. Ohio, 1892); Re Terrell, Id. 213 (Cir. Ct. N. Y., 1892); Re Greene, 52 Id. 104, 117 (Cir. Ct. Ohio, 1892); the case last cited holding such acts not to constitute either an "attempt to monopolize" trade or commerce, or "contracts in restraint of trade" under the Federal anti-trust act. So also independently of such act. National Distilling Co. v. Cream City Importing Co., 86 Wis. 352; s. c., 56 N. W. Rep. 864 (1893); Olmstead v. Distilling &

that it is not necessarily the result of acts of a combination, but may be the result of acts of a mere individual. So it may be, and indeed under present business conditions is almost universally, the result of acts of a single corporation, composed of a combination of individuals.[1] The rules appli-

Cattle Feeding Co., 77 Fed. Rep. 265 (Cir. Ct. Ill., 1896); affirmed in Dennehy v. McNulta, — U. S. App. —; s. c., 86 Fed. Rep. 825 (7th Cir., 1898), where the non-performance of the condition for exclusive trade, was held to prevent recovery on the vouchers, it being held that, the condition being the sole consideration for the promise, if illegal, left no consideration to support it. In Olmstead v. Distilling & Cattle Feeding Co., the court, following Re Greene, above, erroneously rely on Mogul S. S. Co. v. McGregor, L. R. App. Cas. (1892), 25, as an authority, overlooking the distinction there clearly taken between agreements illegal as between the parties, and those giving a right of action to an outside party. This distinction was pointed out in Trenton Potteries Co. v. Oliphant, — N. J. Eq. —; s. c., 39 Atl. Rep. 923, 945 (1898), where the court refused to enforce an agreement not to engage in business. The decision might have rested solely on the ground that the agreement was invalid as in restraint of trade, but the court go further and hold it invalid, as part of a general scheme, comprising similar agreements entered into at the same time with other parties, with a view to create a monopoly. So in Lufkin Rule Co. v. Fringeli, — Ohio St. —; s. c., 49 N. E. Rep. 1030 (1898), a contract in restraint of trade by the seller of a business, though held invalid on a distinct ground, was condemned as tending to create a monopoly, it appearing, according to the terms of the contract, that the covenantee had ample facilities to supply the demand for the goods in question, such demand being a limited one. In United States Chemical Co. v. Provident Chemical Co., 64 Fed. Rep. 946 (Cir. Ct. Mo., 1894), it would seem that the question might have been raised, whether the covenant of the lessor in the lease under consideration, though, considered by itself, a legal contract in restraint of trade, was not illegal as calculated to advance the scheme of the lessee to create a monopoly. The court say: "The motive of the defendant (lessee) was to get rid of a dangerous and aggressive competitor in the trade of the article of which it was in practical control." See Edwards County v. Jennings, 89 Tex. 618; s. c., 35 S. W. Rep. 1053 (1896), for an application of the rule that a promise made upon several considerations, one of which is unlawful, is void.

[1] The incapacity of a corporation to *conspire* was, in People v. Duke, 19 Misc. (N. Y.) 292; s. c., 44 N. Y. Suppl. 836 (N. Y. Co. Gen. Sessions, 1897), held to furnish no obstacle to an indictment against its officers and agents for conspiracy to commit an act illegal as a restric-

cable to such restrictions, when resulting from the acts of an individual or of a combination of individuals, are, generally speaking, applicable to such restrictions when resulting from the acts of a corporation;[1] thus as to all the tests of

tion upon competition (under N. Y. Penal Code, § 168).

Thus, it is said in Stockton v. American Tobacco Co., 55 N. J. Eq. 352, 364; s. c., 36 Atl. Rep. 971 (1897): "The fact that a corporation is an entity, representing an aggregation of skill and capital, does not curtail its right to transact the business which the State's charter empowers it to conduct, with exactly the same freedom as a citizen. So long as by the policy of this State the formation of corporations is permitted, so long will the right of such artificial persons to act within the scope of their franchises, be in no sense different from the right of an individual. The control of a court of equity over the business conduct of either is exactly the same. The contracts of either will be rectified, annulled or specifically enforced, and the duties of either as trustee, or its right as *cestui que trust*, will be enforced and protected. Any illegal conduct of either, leading to irreparable injury, will be enjoined. A nuisance created by either will be restrained. Indeed, whenever either an individual or corporation become related to any other individual or corporation, so that equitable jurisdiction arises to remedy some wrong or secure some right, it matters not whether both parties are individuals or both corporations, or that one is a natural and the other an artificial person." But although the views thus expressed seem substantially correct, they also seem to have been wrongly applied. See § 29, p. 163, above.

[1] In the following cases the acts of corporations were held illegal, just as, apparently, would have been the same acts, if done by an individual or combination of individuals. Thus, in Clancey v. Onondaga Salt Manuf. Co., 62 Barb. (N. Y.) 395 (1862), where the object of a corporation ostensibly formed for the purpose of manufacturing salt, but really to fix and control the price thereof, was held illegal in view of a statute forbidding combinations to fix the price of salt. So in Colles v. Trow City Directory Co., 11 Hun (N. Y.), 397 (1877), where the court say: "The corporation was not created for the purpose of destroying competition and establishing a monopoly, in any way other than such as might be incidental to the superiority of its manufactures and their cheapness and excellence. So in Strait v. National Harrow Co., 18 N. Y. Suppl. 224 (Supm. Ct., Sp. T., 1891). So in Richardson v. Buhl, 77 Mich. 632, 657; s. c., 43 N. W. Rep. 1102 (1889), the objects of a corporation (the Diamond Match Company) were held illegal under the conditions thus described: "The business in which it is engaged is making friction matches. Its articles provide for the aggregation of an enormous amount of capital, sufficient to buy up and absorb all of

legality, and as to the enforcement of agreements by or against the corporation. But the legality of any given act is, in addition to the tests generally applicable to restrictions upon competition, always subject to a further and independ-

that kind of business done in the United States and Canada, to prevent any other person or corporation from engaging in or carrying on the same, thereby preventing all competition in the sale of the article manufactured. This is the mode of conducting the business, and the manner of carrying it on. The sole object of the corporation is to make money, by having it in its power to raise the price of the article, or diminish the quantity to be made and used, at its pleasure. Thus, both the supply of the article and the price thereof are made to depend upon the action of a half dozen individuals, more or less, to satisfy their cupidity and avarice, who may happen to have the controlling interest in this corporation, an artificial person, governed by a single motive or purpose, which is to accumulate money regardless of the wants or necessities of over 60,000,000 of people." So in Distilling & Cattle Feeding Co. v. People, 156 Ill. 448; s. c., 41 N. E. Rep. 188 (1895), was held illegal the Distilling & Cattle Feeding Company, a corporation organized to succeed the Distillers' & Cattle Feeders' Trust, which was an unincorporated association and an illegal "trust" composed of several corporations. The court say (p. 490): "The same interests are controlled in substantially the same way and by the same agencies as before. The nine trustees of the trust, who, as the holders of the capital stock of the corporations, and as a majority of the directors of each, controlled such corporate property, became the subscribers for all the stock of the new corporation, and its board of directors. The conveyance and transfer of the properties of the constituent companies to the new corporation, was merely a transfer by the trustees to themselves, though in a slightly different capacity; and the former stockholders in the constituent companies simply exchanged their trust certificates, share for share, for stock in the new corporation. That corporation thus succeeds to the trust, and its operations are to be carried on in the same way, for the same purposes, and by the same agencies as before. The trust then being repugnant to public policy, and illegal, it is impossible to see why the same is not true of the corporation which succeeds to it and takes its place. The control exercised over the distillery business of the country, over production and prices, and the virtual monopoly formerly held by the trust, are in no degree changed or relaxed, but the methods and purposes of the trust are perpetuated and carried out with the same persistence and vigor as before the organization of the corporation." And held no defense that by its charter the defendant was authorized to purchase and own distillery property, there being no limit placed on the

ent test, arising from the very nature of the corporation as such, namely, whether it is within the corporate powers.[1] This seems to be especially the case, when the corporation acts not singly, but as a member of a combination, whether

amount of property that it might thus acquire. On the other hand, in Central Shade Roller Co. v. Cushman, 143 Mass. 353; s. c., 9 N. E. Rep. 629 (1887), a combination regarded as not otherwise illegal as in restriction of competition, was held not made so illegal by reason of the parties to the combination forming themselves into a corporation.

Statutes designed to prevent restrictions upon competition sometimes expressly specify acts of corporations as included within the prohibition. See for instance as to New York statutes (L. 1890, ch. 564, § 7; L. 1892, ch. 688, § 7) prohibiting combinations between a stock corporation and other corporations, Alexandria Bay Steamboat Co. v. N. Y. Central, etc. R. R. Co., 18 N. Y. App. Div. 527; s. c., 45 N. Y. Suppl. 1091 (1897); National Harrow Co. v. Bement, 21 N. Y. App. Div. 290, 295; s. c., 47 N. Y. Suppl. 462 (1897). In Watson v. Harlem & N. Y. Navigation Co., 52 How. Pr. 348 (Supm. Ct., Sp. T., 1877), a statutory prohibition against "combining" of navigation companies, was held not limited to combination "as respects the commission of unlawful acts," but to prevent the creation or formation of monopolies, by the union or combination of such companies. See as to the effect of art. 4, § 2, par. 4, of the Georgia constitution, Langdon v. Branch, 37 Fed. Rep. 449, 462 (Cir. Ct. Ga., 1888); Hamilton v. Savannah, F. & W. Ry. Co., 49 Fed. Rep. 412 (Cir. Ct. Ga., 1892); Clarke v. Central R. R. & Banking Co., 50 Fed. Rep. 338 (Cir. Ct. Ga., 1892); Clarke v. Richmond & W. P. Terminal, etc. Co., 23 U. S. App. 597; s. c., 62 Fed. Rep. 328 (5th Cir., 1894). (See Appendix.) As to corporations illegal as created in violation of constitutional provisions against restrictions upon competition, see § 18. The Illinois anti-trust act of 1891 was, in Ford v. Chicago Milk Shippers' Assoc., 155 Ill. 166; s. c., 39 N. E. Rep. 651 (1895), held to apply to a corporation formed before its passage.

[1] In some cases the decision might well have rested on the absence of corporate power, it being unnecessary to raise the question whether the acts in question were illegal as in restriction upon corporation. See McCutcheon v. Merz Capsule Co., 37 U. S. App. 586; s. c., 71 Fed. Rep. 787 (6th Cir., 1896). Thus, in State v. Nebraska Distilling Co., 29 Neb. 700; s. c., 46 N. W. Rep. 155 (1890), on the ground that it was *ultra vires* for the corporation to sell all its property, real and personal, together with its franchises and powers necessary to carry on business. In Gulf, Colorado & Santa Fe Ry. Co. v. State, 72 Tex. 404; s. c., 10 S. W. Rep. 81 (1888), the provision of the Texas constitution that "no railroad . . . or managers of

with other corporations or with individuals or partnerships. Thus may be involved the legality of entering into a partnership,[1] or of holding stock in another corporation.[2] Moreover, certain remedies are made applicable by virtue of the

any railroad corporation shall consolidate the stock, property or franchises of such corporation with . . . *or in any way control* any railroad corporation owning or having under its control a parallel or competing line," was held to invalidate an agreement among competing railroad companies for fixing rates of transportation, so as to prevent competition among the parties to the contract. So in Central & Montgomery R. R. Co. v. Morris, 68 Tex. 49; s. c., 3 S. W. Rep. 457 (1887), it was held to invalidate a lease. See, as to effect of the New Hampshire act of 1867 to prevent railroad monopolies, Manchester & Lawrence R. R. v. Concord R. R., 66 N. H. 100, 130; s. c., 20 Atl. Rep. 383 (1890); of the Missouri act (R. S., § 2569) prohibiting a railroad from owning, etc., a competing line, Kimball v. Atchison, Topeka & Santa Fe R. R. Co., 46 Fed. Rep. 888 (Cir. Ct. Mo., 1891); of the Ohio act against leasing such, Hafer v. Cincinnati, H. & D. R. R. Co., 29 Weekly L. Bull. 68 (Hamilton Co., Ohio, Com. Pl., 1893). As to provision of the Pennsylvania constitution forbidding the acquisition of the rights of a parallel and competing railroad by another corporation, see Pennsylvania R. Co. v. Commonwealth, 7 Atl. Rep. 368 (Supm. Ct. Pa., 1886); Catawissa R. R. Co. v. Philadelphia & Reading R. R. Co., 14 Pa. Co. Ct. 280 (1889); of the Nebraska constitution forbidding the consolidation of railroad or telegraph companies with others owning parallel or competing lines, State ex rel. v. Atchison & Nebraska R. R. Co., 24 Neb. 143; s. c., 38 N. W. Rep. 43 (1888). See article by J. C. Thomson on "The Consolidation of Competing? Corporations" in 27 Am. Law Rev. 330 (1893). See also cases cited in note 2, below.

[1] Thus, in People v. North River Sugar Refining Co., 121 N. Y. 582; s. c., 24 N. E. Rep. 834 (1890), where was affirmed a judgment dissolving a corporation, the court did not, as did the court below in 54 Hun, 354; s. c., 7 N. Y. Suppl. 406 (1889), base its decision on the ground that the acts were in restriction of competition, but on the ground that it is illegal for a corporation to enter into a partnership, in this case a "trust," de-

[2] Thus, in People ex rel. v. Chicago Gas Trust Co., 130 Ill. 268, 286; s. c., 22 N. E. Rep. 798 (1889), the decision might have rested solely on the want of power to hold stock in another corporation. See as to power of one railroad corporation to acquire stock in another, Central R. R. Co. v. Collins, 40 Ga. 582 (1869); Hazlehurst v. Savannah, etc. R. R. Co., 43 Ga. 13, 57 (1871); and as to art. 4, § 2, par. 4, of the Georgia constitution, note 1, p. 177, above.

nature of the corporation as such. Thus, the right of a stockholder to obtain relief against a corporate act, illegal as in restriction of competition, is regulated by the same

scribed as "in substance and effect a partnership of twenty separate corporations." To the same effect, in case of a similar agreement, State ex rel. v. Standard Oil Co., 49 Ohio St. 137, 185; s. c., 30 N. E. Rep. 279 (1892), where it is said: "Whether the agreement should be regarded as amounting to a partnership between the several companies, limited partnerships and individuals who are parties to it, it is clear that its observance must subject the defendant to a control inconsistent with its character as a corporation. Under the agreement, all but seven of the shares of the capital stock of the company have been transferred by the real owners to the trustees of the trust, who hold them in trust for such owners; and, being enjoined by the terms of the agreement to endeavor to have 'the affairs' of the several companies managed in a manner most conducive to the interest of the holders of the trust certificates issued by the trust, have the right, in virtue of their apparent legal ownership, and by the terms of the agreement, to select such directors of the company as they may see fit, nay more, may in fact select themselves. The law requires that a corporation should be controlled and managed by its directors in the interest of its own stockholders, and conformable to the purpose for which it was created by the laws of its State. By this agreement, indirectly it is true, but none the less effectually, the defendant is controlled and managed by the Standard Oil Trust, an association with its principal place of business in New York city, and organized for a purpose contrary to the policy of our laws." And similar agreements were held illegal, as providing for a corporation becoming a partner, in Bishop v. American Preservers' Co., 157 Ill. 284; s. c., 41 N. E. Rep. 765 (1895); American Preservers' Trust v. Taylor Manuf. Co., 46 Fed. Rep. 152 (Cir. Ct. Mo., 1891); Mallory v. Hanaur Oil Works, 86 Tenn. 598; s. c., 8 S. W. Rep. 396 (1888). See also Sabine Tramways Co. v. Bancroft, — Tex. Civ. App. —; s. c., 40 S. W. Rep. 837 (1897). It was declared *prima facie* illegal for a corporation to enter into a partnership, in Boyd v. American Carbon Black Co., 182 Pa. St. 206; s. c., 37 Atl. Rep. 937 (1897). But the unqualified statement that a corporation has no power to enter into a partnership seems too broad. See discussion in Green's Brice's Ultra Vires (2d Am. ed.), p. 423, note; also Bates v. Coronado Beach Co., 109 Cal. 160; s. c., 41 Pac. Rep. 855 (1895), where it is said: "There is no rule of law that will preclude a corporation from entering into a contract with an individual, which will have the effect to carry out, directly or indirectly, the object of its incorporation, and to provide in that agreement that the gains or losses of

rules as in case of *ultra vires* contracts generally.[1] So, with reference to action on the part of the State, the dissolution of the corporation is a proper remedy, as in case of *ultra vires* acts generally.[2] Notwithstanding the well-established

the venture shall be borne equally by both parties."

[1] Stewart v. Erie & Western Transp. Co., 17 Minn. 372, 400 (1871). Thus, as to his right to relief being barred by participation, acquiescence or delay, Coquard v. National Linseed Oil Co., note 2, below, which see also as to right to maintain a suit for dissolution of the corporation.

[2] On this ground judgments were rendered dissolving the corporations, in People v. North River Sugar Refining Co., 54 Hun, 354; s. c., 7 N. Y. Suppl. 406; affirmed in 121 N. Y. 582; s. c., 24 N. E. Rep. 834 (1890); People v. Milk Exchange, 145 N. Y. 267; s. c., 39 N. E. Rep. 1062 (1895); Distilling & Cattle Feeding Co. v. People, 156 Ill. 448; s. c., 41 N. E. Rep. 188 (1895); State v. Nebraska Distilling Co., 29 Neb. 700; s. c., 46 N. W. Rep. 155 (1890); People ex rel. v. American Sugar Refining Co., 7 Ry. & Corp. L. J. 83 (Super. Ct. San Francisco, 1890). See People ex rel. v. Chicago Gas Trust Co., 130 Ill. 268; s. c., 22 N. E. Rep. 798 (1889); People ex rel. v. Chicago Live Stock Exchange, 170 Ill. 556; s. c., 48 N. E. Rep. 1062 (1897). In State ex rel. v. Standard Oil Co., 49 Ohio St. 137, 189; s. c., 30 N. E. Rep. 279 (1892), the judgment was of ouster of the corporation from the right to make and perform the agreement. But a suit for dissolution of the corporation cannot be maintained by a mere stockholder. Coquard v. National Linseed Oil Co., 171 Ill. 480; s. c., 49 N. E. Rep. 563 (1898). Upon forfeiture of the charter of a corporation for joining or maintaining a monopoly, held, under the California statutes, that the appointment of a receiver was not proper. Havemeyer v. Superior Court, 84 Cal. 327; s. c., 24 Pac. Rep. 121 (1890). Compare Cameron v. Havemeyer, 12 N. Y. Suppl. 126 (Supm. Ct., Sp. T., 1890), where receivers were appointed of property held under the Sugar Trust agreement declared illegal in 121 N. Y. 582. As to proceedings in an action to dissolve the combination to which the North River Sugar Refining Company was a party, see Gray v. De Castro & Donner Co., 10 N. Y. Suppl. 632 (Supm. Ct., Gen. T., 1890). The circumstance that a corporation was formed to create a monopoly, was held not to make the attorney-general a necessary party to a proceeding brought by the receiver of the corporation after its dissolution, the suit relating "wholly to contractual and statutory obligations arising out of its existence and operations." The court say: "The State presumably would be interested either in preventing the organization of such a corporation, or in arresting its work after its organization. Here, however, the company is already dissolved, and therefore harmless." See v. Heppenheimer, 55 N. J. Eq. 240; s. c., 36 Atl. Rep. 966 (1897). Under the Texas anti-trust acts of 1889 and

technical distinction between a corporation and its members, as legal entities, there has developed a strong tendency to regard acts of a combination of stockholders in restriction of competition, as in effect the act of the corporation, so far as legal consequences are concerned, though technically there has been no corporate act whatever.[1]

1895, the right of a foreign corporation to transact business in the State was declared forfeited in Waters-Pierce Oil Co. v. State, — Tex. Civ. App. —; s. c., 44 S. W. Rep. 936 (1898).

[1] Thus, in State ex rel. v. Standard Oil Co., 49 Ohio St. 137, 184; s. c., 30 N. E. Rep. 279 (1892), the agreement held illegal was not executed by the corporation itself, but by all the stockholders. It was contended that the corporation was a legal entity separate from its stockholders, and that their acts could not be ascribed to the corporation. The court say: "Where all, or a majority, of the stockholders comprising a corporation, do an act which is designed to affect the property and business of the company, and which, through the control their numbers give them over the selection and conduct of the corporate agencies, does affect the property and business of the company in the same manner as if it had been a formal resolution of its board of directors; and the act so done is *ultra vires* of the corporation and against public policy, and was done by them in their individual capacity for the purpose of concealing their real purpose and object, the act should be regarded as the act of the corporation; and, to prevent the abuse of corporate power, may be challenged as such by the State in a proceeding in *quo warranto*." Similarly the unlawfully becoming a member of a partnership was, in People v. North River Sugar Refining Co., 121 N. Y. 582; s. c., 24 N. E. Rep. 834 (1890), held to be the action of the corporation itself, and not of the stockholders as mere individuals. See also People ex rel. v. American Sugar Refining Co., 7 Ry. & Corp. L. J. 83 (Super. Ct. San Francisco, 1890). So in Ford v. Chicago Milk Shippers' Assoc., 155 Ill. 166; s. c., 39 N. E. Rep. 651 (1895), holding not maintainable an action by a corporation composed of milk producers, to recover for milk sold. This on the ground that the corporation was within the prohibition of the Illinois anti-trust act of 1891 against "trusts" and "combinations." The court say: "The corporation as an entity may not be able to create a trust or combination with itself, but its individual shareholders may, in controlling it, together with it, create such trust or combination that will constitute it, with them, alike guilty." But under the Federal anti-trust act, acts of the corporation were held to impose no criminal liability upon stockholders or others interested in the corporation. Re Greene, 52 Fed. Rep. 104, 112 (Cir. Ct. Ohio, 1892).

APPENDIX.

I.

CONSTITUTIONAL AND STATUTORY PROVISIONS RELATING TO TOPICS TREATED IN PART I.

We here include such provisions as most specifically and directly bear upon such topics. But many provisions not here included have, or may have, a more or less direct bearing thereupon, such as penal provisions against extortion, libel, malicious mischief and threats; provisions for the incorporation of labor organizations, and the establishment of official boards of arbitration to settle disputes between employee and employer. So we omit reference to many provisions of a special character, such as those relating to seamen. So, as being for the most part obsolete, provisions solely applicable to apprentices. Provisions on the subject of conspiracy are not referred to, except as specially bearing upon the topic under consideration.

ALABAMA: By Criminal Code (1896), § 5504, it is a crime to entice away an apprentice or servant; by § 5505, to knowingly entice away a laborer or servant under contract; by § 5511, to "by force or threats of violence to person or property, prevent or seek to prevent another from doing work, or furnishing materials, or from contracting to do work, or furnish materials, for or to any person engaged in any lawful business, or disturb, interfere with, or prevent, or in any manner attempt to prevent, the peaceable exercise of any lawful industry, business or calling by any other person."

CALIFORNIA: By Penal Code, § 646, it is a crime to "wilfully and knowingly aid, assist or encourage to run away, or harbor or conceal, any person bound or held to service or labor;" by § 679, to coerce a person to agree not to join a labor organization as a condition of being employed.

COLORADO: By L. 1897, ch. 31, blacklisting and boycotting are crimes. See also as to blacklisting, Mills' Statutes (1891), §§ 239, 240. By L. 1897, ch. 50, it is a crime to discharge or threaten to discharge an employee because of connection with a labor organization or political party. By Mills' Statutes, § 1295, it is thus provided: "It shall not be unlawful for any two or more persons to unite or combine, or agree in any manner to advise or encourage, by peaceable means, any person or persons to enter into any combination in relation to entering into or remaining in the employment of any person, persons or corporation; or in relation to the amount of wages or compensation to be paid for labor; or for the purpose of regulating the hours of labor; or for the procuring of fair and just treatment from employees (employers?); or for the purpose of aiding and protecting their welfare and interests in any other manner not in violation of the constitution of this State, or the laws made in pursuance thereof. Provided, that this act shall not be so construed as to permit two or more persons by threats of either bodily or financial injury, or by any display of force, to prevent or intimidate any other person from continuing in such employment as he may see fit; or to boycott or intimidate any employer of labor."

CONNECTICUT: By L. 1897, ch. 184, blacklisting is a crime. By General Statutes (1888), § 1517, it is a crime to "unlawfully, maliciously and in violation of one's duty or contract, unnecessarily abandon any locomotive, car, or train of cars, or street railway car;" by § 1518, to "threaten or use any means to intimidate any person, to compel such person, against his will, to do, or abstain from doing, any act which such person has a legal right to do; or persistently follow such person in a disorderly manner, or injure or threaten to injure his property with intent to intimidate him."

DELAWARE: By Revised Code (1893), ch. 79, § 18, it is a crime to "knowingly employ or deal with any apprentice or servant, without his master's consent." L. 1877, ch. 481 (Revised Code, p. 928), is substantially the same as New Jersey, p. 2696, §§ 245–48, which see below.

FLORIDA: By Revised Statutes (1892), § 2405, it is a crime to entice away a servant or laborer under contract. By L. 1893, ch. 4144, to conspire to prevent the employment or cause the discharge of a person; or to threaten injury to "life, property or business" for such purpose. By L. 1893, ch. 4207, blacklisting is a crime, with a provision for civil liability to the person injured. The provisions herein for the protection of discharged employees are quite elaborate.

GEORGIA: By Penal Code (1895), § 121, it is a crime to employ the servant of another if under written contract. By § 122, to knowingly entice away the servant of another. So, by § 123 (compare § 119), to prevent one, by unlawful means, from engaging in an employment or

occupation; by § 124, to conspire to so prevent by "threats, violence or intimidation;" by § 125, to prevent a person from being employed as laborer or employee; by § 126, to prevent the owner of property from using the same or employing laborers. Penal Code, §§ 128–134, and Civil Code (1895), §§ 1873–1878, are substantially the same as Florida L. 1893, ch. 4207, which see above.

IDAHO: By L. 1893, p. 152, it is a crime to make an agreement with a person whereby he is, as a condition of employment, not to belong to a labor organization.

ILLINOIS: By Revised Statutes, ch. 9, § 19, a civil liability is created for enticing away "any clerk, apprentice or servant." By L. 1877, p. 167 (Starr & Curtis' 2d ed., vol. 3, p. 3297, §§ 128–131), it is a crime for "any locomotive engineer, in furtherance of any combination or agreement, (to) wilfully and maliciously abandon his locomotive upon any railroad at any other point than the regular schedule destination of such locomotive." (§ 128.) So, "if any person or persons shall wilfully and maliciously, by any act or by means of intimidation, impede or obstruct, except by due process of law, the regular operation and conduct of the business of any railroad company or other corporation, firm or individual in this State, or of the regular running of any locomotive engine, freight or passenger train of any such company, or the labor and business of any such corporation, firm or individual." (§ 129). So, "if two or more persons shall wilfully and maliciously combine or conspire together to obstruct or impede, by any act or by means of intimidation, the regular operation and conduct of the business of any railroad company, or any other corporation, firm or individual in this State, or to impede, hinder or obstruct, except by due process of law, the regular running of any locomotive engine, freight or passenger train on any railroad, or the labor or business of any such corporation, firm or individual." (§ 130.) But these three sections are not to be "construed to apply to cases of persons voluntarily quitting the employment of any railroad company, or such other corporation, firm or individual, whether by concert of action or otherwise, except as is provided in § 128." (§ 131.) By Revised Statutes, ch. 38, § 96, as amended by L. 1887, p. 167 (Starr & Curtis, vol. 1, p. 1250), "if any two or more persons conspire or agree together, or the officers or executive committee of any society or organization or corporation, shall issue or utter any circular or edict, as the action of or instruction to its members, or any other persons, societies, organizations or corporations, for the purpose of establishing a so-called boycott or blacklist, or shall post or distribute any written or printed notice in any places, with the fraudulent or malicious intent wrongfully and wickedly to injure the person, character, business or employment or property of another, or to obtain money or other property by false pretenses, or to do any illegal act, injurious to the public trade, health, morals, police or administration of public justice, or to prevent

competition in the letting of any contract by the State or the authorities of any counties, city, town or village, or to induce any person not to enter into such competition, or to commit any felony, they shall be deemed guilty of a conspiracy" (with provision for a penalty). By Revised Statutes, ch. 38, § 294, it is a crime "if any two or more persons shall combine for the purpose of depriving the owner or possessor of property of its lawful use and management, or of preventing by threats, suggestions of danger, or any unlawful means, any person from being employed by, or obtaining employment from, any such owner or possessor of property, on such terms as the parties concerned may agree upon." So, "if any person shall by threat, intimidation or unlawful interference, seek to prevent any other person from working, or from obtaining work at any lawful business, on any terms that he may see fit." Id., § 295. So, to "enter a coal bank, mine, shaft, manufactory, building or premises of another, with intent to commit any injury thereto, or by means of threats, intimidation or riotous or other unlawful doings, to cause any person employed therein to leave his employment." Id., § 296. By L. 1893, p. 98 (Starr & Curtis, vol. 1, p. 1315), it is a crime to coerce an employee by discharge, because of connection with a labor organization.

INDIANA: By L. 1893, p. 146 (Burns' Statutes, § 2302), it is a crime to coerce an employee by making non-membership in any labor organization a condition of employment. By L. 1889, p. 315 (Statutes, § 7076), to attempt to prevent a discharged employee from obtaining employment, with a provision for civil liability to the person injured. By Statutes, § 7077, as amended by L. 1895, p. 230 (and see Statutes, § 7078), a civil liability is created for blacklisting by corporations. See §§ 7073–74 for prohibition of coercion of employee to buy at a particular place.

IOWA: By Code (1897), § 5027, it is a crime to attempt to prevent a discharged employee from obtaining employment, with a provision for civil liability to the person injured. By § 5028, a civil liability is created for blacklisting by corporations. By § 5059, it is a crime to conspire "wrongfully to injure the person, character, business, property or rights in property of another, or to do any illegal act injurious to the public trade," etc.

KANSAS: By General Statutes (1897), ch. 73, §§ 30, 31, it is a crime to coerce an employee by discharge, because of connection with a labor organization, with a provision for civil liability to the person injured. By §§ 36, 38, 39, to attempt to prevent a discharged employee from obtaining employment, with a provision for civil liability to the person injured. Ch. 100, §§ 407–410, are the same as Illinois L. 1877, p. 167, which see above.

KENTUCKY: By Statutes (1894), ch. 32, § 802, it is a crime "for any person or persons to prevent, hinder or delay, or to attempt to prevent,

hinder or delay, by violence, the transportation of freight or passengers in this State, by any individual, firm, company, corporation or association doing business in this State, or to interfere with, by violence, any person or agency engaged in the conduct of commerce and traffic in this State, in such manner as to obstruct or impede the movement and conduct of such commerce or traffic; but nothing herein shall be construed to prevent any person or class of persons from quitting their employment at any time they see proper." By § 803, "for any person or persons to prevent or hinder, or attempt to prevent or hinder, by coercion, intimidation, or any trespass or violent interference therewith, the free and lawful use of his or its property by any individual, firm, company, corporation or association engaged in the business of transporting freight and passengers, and in the conduct of commerce and traffic in this State, or the free and lawful use of said property by any agent or employee of the owner thereof." By ch. 86, § 1849, to entice away one under a contract of labor for a fixed period of time, with a provision for civil liability to the person injured. See as to coercion by employers of miners, L. 1898, ch. 15, § 2.

LOUISIANA: By Revised Statutes, § 902, it is a crime to discharge an employee because of political opinions. By L. 1892, p. 71 (Wolff's Revised Laws, p. 516), to "wilfully violate a contract of labor upon the faith of which money or goods have been advanced, and without first tendering to the person from whom said money or goods was obtained, the amount of money or value of the goods;" also to entice away a laborer under such contract.

MAINE: By L. 1889, ch. 303, as amended by L. 1891, ch. 127, it is a crime if "any employer, employee or other person, by threats of injury, intimidation or force, alone or in combination with others, prevents any person from entering into, continuing in or leaving the employment of any person, firm or corporation." By Revised Statutes, ch. 123, § 6, if "any employee of a railroad corporation, in pursuance of an agreement or combination by two or more persons to do, or procure to be done, any act in contemplation or furtherance of a dispute between such corporation and its employees, unlawfully, or in violation of his duty or contract, stops or unnecessarily delays, or abandons, or in any way injures a locomotive or any car or train of cars on the railway track of such corporation, or in any way hinders or obstructs the use of any locomotive, car or train of cars on the railroad of such corporation." So by § 7, if any one "having charge of any locomotive or carriage, while upon or in use on any railway of any railroad corporation, wilfully stops, leaves or abandons the same, or renders, or aids or assists in rendering, the same unfit for or incapable of immediate use, with intent thereby to hinder, delay or in any manner to obstruct or injure the management and operation of any railroad or railway, or the

business of any corporation operating or owning the same, or of any other corporation or person." See also § 8. So by § 9, if any one "alone or in pursuance or furtherance of any agreement or combination with others, to do or procure to be done any act in contemplation or furtherance of a dispute or controversy between a gas, telegraph or railroad corporation and its employees or workmen, wrongfully, and without legal authority, uses violence towards or intimidates any person, in any way or by any means, with intent thereby to compel such person against his will to do or abstain from doing any act which he has a legal right to do or abstain from doing; or, on the premises of such corporation, by bribery, or in any manner or by any means induces, or endeavors or attempts to induce, such person to leave the employment and service of such corporation, with intent thereby to further the objects of such combination or agreement; or in any way interferes with such person while in the performance of his duty; or threatens or persistently follows such person in a disorderly manner, or injures or threatens to injure his property with either of said intents." So by § 10, if "any person in the employment of a railroad corporation, in furtherance of the interests of either party to a dispute between another railroad corporation and its employees, refuses to aid in moving the cars of such other corporation, or trains in whole or in part made up of the cars of such other corporation, over the tracks of the corporation employing him; or refuses to aid in loading or discharging such cars, in violation of his duty as such employee." Ch. 126, § 18, is substantially the same as Iowa Code, § 5059, which see above.

MARYLAND: By Public General Laws (1888), art. 27, § 81, "an agreement or combination by two or more persons to do, or procure to be done, any act in contemplation or furtherance of a trade dispute between employers and workmen, shall not be indictable as a conspiracy, if such act, committed by one person, would not be punishable as an offense."

MASSACHUSETTS: L. 1894, ch. 508, entitled "An act regulating the employment of labor," is well worthy the careful attention of the economist and the statesman, as an elaborate code of provisions as to the relation between employer and employee. Of its many provisions we here note only a few that seem to most directly bear upon the topics under consideration. By § 2 it is a crime to, by intimidation or force, prevent, or seek to prevent, one from entering into or continuing in employment. By § 3, to coerce an employee to agree not to belong to a labor organization, as a condition of employment. By § 5, to attempt to influence the vote of an employee, by threat of discharge or reduction of wages.

MICHIGAN: By Howell's Statutes (1882), § 9273, it is a crime to, "by threats, intimidations or otherwise, and without authority of law, inter-

fere with, or in any way molest or attempt to interfere with, or in any way molest or disturb, without such authority, any mechanic or other laborer, in the quiet and peaceable pursuit of his lawful avocation." See, as to making employment conditioned on contribution to fund, L. 1893, ch. 192.

MINNESOTA: By L. 1895, ch. 174, it is a crime to combine to prevent a person from procuring employment, by threats, promises, or the circulation of blacklists, or to procure the discharge of an employee. So blacklisting generally is a crime; also to coerce one not to belong to a labor organization as a condition of obtaining employment. So also L. 1895, ch. 172. Statutes (1894), § 6423, subds. 5, 6, §§ 6424, 6790, are the same as New York Penal Code, § 168, subds. 5, 6, §§ 170, 653, respectively, which see below.

MISSISSIPPI: By Const., § 191, "the legislature shall provide for the protection of the employees of all corporations doing business in this State, from interference with their social, civil or political rights by said corporations, their agents or employees." See Code (1892), § 840. § 1006, subds. 5, 6, is the same as New York Penal Code, § 168, subds. 5, 6, which see below. By § 1068 it is a crime to entice away a laborer under contract for a specified time, with a provision for civil liability to the person injured. The provisions of § 1270 against a conspiracy to impede a railroad company, are declared not to apply to "persons who merely quit the employment of a railroad company, whether by concert of action or not."

MISSOURI: By L. 1893, p. 187, it is a crime to coerce an employee not to belong to a labor organization. By L. 1891, p. 122, blacklisting is a crime. By Revised Statutes (1889), ch. 47, § 3783, it is a crime to "by force, menace or threats of violence to the person or property of another, compel or attempt to compel any person to abandon any lawful occupation or employment for any length of time, or prevent or attempt to prevent any person from accepting or entering upon any lawful employment." So to "by threats of violence to the person or property of another, compel or attempt to compel any person to abandon any lawful occupation or employment for any length of time, or prevent any person from accepting or entering upon any lawful employment."

MONTANA: By Penal Code, § 325, the provisions as to conspiracy are declared not to apply "to any arrangement, agreement or combination between laborers made with the object of lessening the number of hours of labor, or increasing wages." § 1154 is the same as California Penal Code, § 646. By Political Code, §§ 3390–92 (and see Penal Code, § 656), blacklisting is a crime, with a provision for civil liability to the person injured.

NEVADA: General Statutes, § 4660, as amended by L. 1887, ch. 79, contain provisions substantially the same as New York Penal Code, § 168,

subd. 6, § 170, which see above. By § 624, a civil liability is created for enticing away a "clerk or servant." By L. 1895, ch. 75, it is a crime to wilfully prevent a former employee from obtaining employment.

NEW HAMPSHIRE: By Public Statutes (1891), ch. 266, § 12, it is a crime to "interfere in any way whatever, to injure or damage another in his person or property, while engaged in his lawful business, trade or occupation, or while on the way to or from the same, or endeavor to prevent any person from engaging in his lawful business, trade or calling."

NEW JERSEY: By Revision (1895), p. 66, § 6, a civil liability is created for enticing away a "clerk, apprentice or servant." By p. 1905, §§ 45, 46, it is a crime to coerce an employee to agree not to belong to any organization as a condition of employment. By p. 2344, § 23, "it shall not be unlawful for any two or more persons to unite, combine or bind themselves by oath, covenant, agreement, alliance or otherwise, to persuade, advise or encourage, by peaceable means, any person or persons to enter into any combination for or against leaving or entering into the employment of any person, persons or corporation." By p. 2696, §§ 245–48, the following acts are made crimes: "If any locomotive engineer or other railroad employee upon any railroad within this State, engaged in any strike, or with a view to incite others to such strike, or in furtherance of any combination or preconcerted arrangement with any person to bring about a strike, shall abandon the locomotive engine in his charge, when atttached either to a passenger or freight train, at any place other than the schedule or otherwise appointed destination of such train, or shall refuse or neglect to continue to discharge his duty, or to proceed with said train to the place of destination as aforesaid." "If any locomotive engineer or other railroad employee within this State, for the purpose of furthering the object of or lending aid to any strike or strikes organized or attempted to be maintained on any other railroad, either within or without the State, shall refuse or neglect, in the course of his employment, to aid in the movement over and upon the tracks of the company employing him of the cars of such other railroad company, received therefrom in the course of transit." "If any person, in aid or furtherance of the objects of any strike upon any railroad, shall interfere with, molest or obstruct any locomotive engineer or other railroad employee engaged in the discharge and performance of his duty as such." "If any person or persons, in aid or furtherance of the objects of any strike, shall obstruct any railroad track within this State, or shall injure or destroy the rolling-stock or any other property of any railroad company, or shall take possession of or remove any such property, or shall prevent or attempt to prevent the use thereof by such railroad company or its employees, or shall, by offer of recompense, induce any employee of any railroad company within this State to leave the service of such company while in transit."

NEW YORK: By Penal Code, § 658, it is a crime if "a person, with a view to compel another person to do or to abstain from doing an act which such other person has a legal right to do or to abstain from doing, wrongfully and unlawfully (1) uses violence or inflicts injury upon such other person or his family, or a member thereof, or upon his property, or threatens such violence or injury; or (2) deprives any such person of any tool, implement or clothing, or hinders him in the use thereof; or (3) uses or attempts the intimidation of such person by threats or force." By § 168, subd. 5, it is a crime for two or more persons to conspire either "to prevent another from exercising a lawful trade or calling, or doing any other lawful act, by force, threats, intimidation, or by interfering or threatening to interfere with tools, implements or property belonging to or used by another, or with the use or employment thereof;" by subd. 6, "to commit any act injurious to the public health, to public morals, or to trade or commerce, or for the perversion or obstruction of justice, or of the due administration of the laws." By § 170, "the orderly and peaceable assembling or co-operation of persons employed in any calling, trade or handicraft, for the purpose of obtaining an advance in the rate of wages or compensation, or of maintaining such rate, is not a conspiracy." By § 171*a*, it is a crime to coerce an employee not to belong to a labor organization, as a condition of employment. By § 673, to "wilfully and maliciously, either alone or in combination with others, break a contract of service or hiring, knowing, or having reasonable cause to believe, that the probable consequence of his so doing will be to endanger human life, or to cause grievous bodily injury, or to expose valuable property to destruction or serious injury."

NORTH CAROLINA: Code (1883), § 3119, creates a civil and a criminal liability for enticing away a servant.

NORTH DAKOTA: By Const., § 28, "every citizen of this State shall be free to obtain employment wherever possible, and any person, corporation, or agent thereof, maliciously interfering or hindering in any way any citizen from obtaining or enjoying employment already obtained, from any other corporation or person, shall be deemed guilty of a misdemeanor." By § 212, "the exchange of black lists between corporations shall be prohibited." Penal Code, § 7037, subds. 5, 6, § 7039, are the same as New York Penal Code, § 168, subds. 5, 6, § 170, respectively, which see above. By § 7041, it is a crime to hinder in obtaining or enjoying employment; by § 7042, blacklisting is a crime; by § 7660, it is a crime to use "force, threats or intimidation" against employees (and see § 7662); so by § 7661, against employers.

OKLAHOMA: Statutes (1893), § 2061, subd. 5, is the same as New York Penal Code, § 168, subd. 6, which see above; §§ 2544–45, as North Dakota Penal Code, §§ 7660–61, which see above. By L. 1897, ch. 13, art. 4, blacklisting is a crime.

OREGON: By 1 Hill's Annotated Laws (1892), § 1893, it is a crime "if any person shall, by force, threats or intimidation, prevent, or endeavor to prevent, any person employed by another, from continuing or performing his work, or from accepting any new work or employment; or if any person shall circulate any false written or printed matter, or be concerned in the circulation of any such matter, to induce others not to buy from, or sell to, or have dealings with any person, for the purpose, or with the intent, to prevent such person from employing any person, or to force or compel him to employ or discharge from his employment any one, or to alter his mode of carrying on his business, or to limit or increase the number of his employees, or their rate of wages, or time of service."

PENNSYLVANIA: Brightly's Purdon's Digest, 12th ed. (1894), p. 533, §§ 357–60, are the same as New Jersey General Statutes (1895), p. 2696, §§ 245–48, respectively (which see above), save as to a difference of penalty in § 360, and the omission therefrom of the prohibition against inducing leaving service. By L. 1897, ch. 98, it is a crime to interfere with an employee as to membership in a labor organization. By Digest, p. 484, § 73 (see § 72), "it shall be lawful for employees, acting either as individuals or collectively, or as the members of any club, assembly, association, or organization, to refuse to work or labor for any person, persons, corporation or corporations, whenever in his, her or their opinion, the wages paid are insufficient, or his, her or their treatment is offensive or unjust, or whenever the continued labor or work by him, her or them would be contrary to the constitution, rules, regulations, by-laws, resolution or resolutions of any club, assembly, association, organization or meeting of which he, she or they may be a member, or may have attended, without creating a criminal liability for conspiracy." But this does not legalize using force or threats to hinder others from working.

RHODE ISLAND: By General Laws (1896), ch. 278, § 8, it is a crime to, by "force, violence, threats or intimidation of any kind," prevent pursuit of employment; by ch. 279, § 45, to "wilfully and maliciously or mischievously . . . obstruct another in the prosecution of his lawful business or pursuits in any manner."

SOUTH CAROLINA: By Criminal Statutes (1893), § 291, it is a crime to entice away a "tenant, servant or laborer" under contract; by L. 1897, ch. 286, to violate a contract of employment after receiving supplies.

SOUTH DAKOTA: Penal Code, § 225, subd. 5, is the same as New York Penal Code, § 168, subd. 6, which see above. §§ 733, 734, are the same as North Dakota Penal Code, §§ 7660–61, respectively, which see above; and see § 735.

TENNESSEE: By Code (1896), §§ 4337–38, a civil liability is created for enticing away an employee; by §§ 6879–86, certain acts are made crimes, such as coercing employees as to whom they shall deal with.

§ 6693, subd. 7 (see § 6786, subd. 6), is substantially the same as New York Penal Code, § 168, subd. 6, which see above.

TEXAS: Penal Code, § 309, makes criminal, assemblies to prevent pursuit of occupation. So of riots. § 324.

UTAH: By Const., art. 12, § 19, also by Revised Statutes (1898), §§ 1340, 1341, blacklisting is made a crime; so by Const., art. 16, § 4, the exchange of blacklists is prohibited. Penal Code, § 4156, subd. 5, is the same as New York Penal Code, § 168, subd. 6, which see above.

VERMONT: By Statutes (1894), § 5041, it is a crime to "threaten violence or injury to another person with intent to prevent his employment in a mill, manufactory, shop, quarry, mine, railroad or other occupation." By § 5040, to "by threats, intimidation or by force, alone or in combination with others, affright, drive away or prevent another person from accepting, undertaking or prosecuting such employment, with intent to prevent the prosecution of work in such mill, shop, manufactory mine, quarry, railroad or other occupation."

VIRGINIA: By L. 1891-92, p. 976, it is a crime for a corporation to prevent a discharged employee from obtaining employment.

WISCONSIN: By Statutes (1898), § 4466*a*, it is a crime to combine to "wilfully or maliciously injure another in his reputation, trade, business or profession," or "maliciously compel another to do or perform any act against his will, or prevent or hinder another from doing or performing any lawful act." By § 4466*b*, blacklisting is a crime. So to coerce an employee not to belong to a labor organization as a condition of employment. By § 4466*c*, it is a crime to "by threats, intimidation, force or coercion" hinder or prevent another from engaging or continuing in employment.

WYOMING: By L. 1893, ch. 9, it is a crime to discharge an employee because of nomination for office, or to interfere in the matter of the nomination of such employee.

II.

CONSTITUTIONAL AND STATUTORY PROVISIONS RELATING TO TOPICS TREATED IN PART II.

We here consider such provisions as specifically relate to combinations to create restrictions upon competition. But we omit any reference to many provisions confined in their application to specific lines of business, such as the numerous prohibitions against the consolidation of parallel and competing railroad or telegraph lines, or the recent provisions against combinations to fix rates of insurance. We here merely give a list of what are commonly known as "anti-trust acts." In this connection reference may properly be made to the constitutional provisions in some States, specifically prohibiting monopolies, as the provision of the Texas constitution, art. 1, § 26, that "monopolies are contrary to the genius of a free government, and shall never be allowed." To similar effect are provisions in the constitutions of Arkansas (art. 2, § 19); Maryland (Declaration of Rights, art. 41); North Carolina (art. 1, § 31); Tennessee (art. 1, § 22); Wyoming (art. 1, § 30).

The following is a list of the anti-trust acts in the different States (including the Federal acts):

UNITED STATES: Act of July 2, 1890 (26 Stat. at Large, p. 209); act of August 27, 1894 (28 Stat. at Large, p. 570; see § 34 of Tariff Act of 1897).

ALABAMA: Criminal Code (1896), §§ 5557–59.

ARKANSAS: L. 1897, ch. 46.

CALIFORNIA: L. 1893, ch. 19 (limited to live-stock).

FLORIDA: L. 1897, ch. 4534 (limited to cattle and meat).

GEORGIA: L. 1896, p. 68; see Const., art. 4, § 2, par. 4.

IDAHO: Const., art. 11, § 18.

ILLINOIS: L. 1891, p. 206 (as amended by L. 1893, p. 89; L. 1897, p. 298); L. 1893, p. 182 (Starr & Curtis' Statutes, vol. 1, pp. 1252–57).

INDIANA: L. 1897, ch. 104.

IOWA: Code (1897), §§ 5060–67.

KANSAS: General Statutes (1897), ch. 145.

KENTUCKY: Statutes (1894), §§ 3915–20; see Const., § 198.

LOUISIANA: L. 1890, ch. 86; L. 1892, ch. 90 (Wolff's Revised Laws, pp. 204, 205). See as to rebate certificates, L. 1894, ch. 176 (Wolff's Laws, p. 907). Const. § 190.

MAINE: L. 1889, ch. 266.

MICHIGAN: Howell's Statutes (Supplement), §§ 9854*j–p* (L. 1889, ch. 225).

MINNESOTA: Statutes (1894), §§ 6955–57; see Const., art. 4, § 35.

MISSISSIPPI: Code (1892), § 1007; ch. 140 (see as amended by L. 1896, ch. 89; L. 1898, ch. 72); see Const., § 198.

MISSOURI: L. 1891, p. 186; see as amended by L. 1895, p. 237; L. 1897, p. 209.

MONTANA: Penal Code, § 321; see Const., art. 15, § 20. See as to combinations of laborers, Penal Code, § 325.

NEBRASKA: L. 1897, ch. 79; see chs. 80, 81; Statutes (1895), § 6959. As to rebate vouchers, see Statutes, ch. 73*a*.

NEW MEXICO: Compiled Laws (1897), §§ 1292–94.

NEW YORK: L. 1892, ch. 688, § 7; L. 1897, ch. 383.

NORTH CAROLINA: L. 1889, ch. 374.

NORTH DAKOTA: Penal Code (1895), ch. 51; see Const., art. 7, § 146.

OHIO: L. 1898, p. 143. By Revised Statutes, 7th ed., § 6984*a*, cornering and forestalling are made crimes.

OKLAHOMA: Statutes (1893), ch. 83.

SOUTH CAROLINA: L. 1897, ch. 265 (see as amended by L. 1898, ch. 487). See Const., art. 9, § 13.

SOUTH DAKOTA: L. 1890, ch. 154, as amended by L. 1893, ch. 171; L. 1897, ch. 94.

TENNESSEE: Code (1896), §§ 3185–91, 6622; L. 1897, ch. 94. See L. 1897, ch. 93. See Code (1896), § 3077.

TEXAS: Civil Statutes (1895), arts. 5313–21*a*; Penal Code, arts. 976–988*d*.

UTAH: Revised Statutes (1898), §§ 1752–62. See Const., art. 12, § 20.

WASHINGTON: Const., art. 12, § 22.

WISCONSIN: Statutes (1898), §§ 1747*e–h*, 1791*j–m*.

WYOMING: Const., art. 10 (Corporations), § 8.

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